No. 13-894

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, PETITIONER

v.

ROBERT J. MACLEAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has directed that the Transportation Security Administration "shall prescribe regulations prohibiting" the "disclosure of information obtained or developed" in carrying out certain transportation-security functions, if the agency "decides" that "disclosing the information would * * * be detrimental" to transportation security. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(e), 115 Stat. 603; Homeland Security Act of 2002, Pub. L No. 107-296, Tit. XVI, § 1601(b), 116 Stat. 2312. Such information is referred to in the regulations as "Sensitive Security Information." See, *e.g.*, 67 Fed. Reg. 8351 (Feb. 22, 2002).

The question presented is whether certain statutory protections codified at 5 U.S.C. 2302(b)(8)(A), which are inapplicable when an employee makes a disclosure "specifically prohibited by law," can bar an agency from taking an enforcement action against an employee who intentionally discloses Sensitive Security Information.

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The Solicitor General, on behalf of the United States Department of Homeland Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 714 F.3d 1301. The opinions of the Merit Systems Protection Board (App., *infra*, 19a-56a, 113a-139a) are reported at 112 M.S.P.R. 4 and 116 M.S.P.R. 562. The orders of the administrative judge (App., *infra*, 57a-112a, 140a-164a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2013. A petition for rehearing was denied on August 30, 2013 (App., *infra*, 165a-166a). On November 19, 2013, the Chief Justice extended the time

within which to file a petition for a writ of certiorari to and including December 28, 2013. On December 18, 2013, the Chief Justice further extended the time to and including January 27, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App., *infra*, 167a-189a.

STATEMENT

1. Following the attacks of September 11, 2001, Congress enacted the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597, to "address the security of the nation's transportation system." H.R. Conf. Rep. No. 296, 107th Cong., 1st Sess. 54 (2001). In enacting the ATSA, Congress determined that "the best way to ensure effective Federal management of the nation's transportation system is through the creation of a new Administration" within the Department of Transportation "to be called the Transportation Security Administration (TSA)," whose responsibilities would "encompass security in all modes of transportation." *Id.* at 55; see ATSA, § 101(a), 115 Stat. 597 (49 U.S.C. 114(a)). The TSA's duties under the ATSA include daily security screening for air travel; receipt, analysis, and distribution of intelligence relating to transportation security; improvement of existing security procedures; assessment of security measures for cargo transportation; and oversight of security at airports and other transportation facilities. § 101(a), 115 Stat. 597-598 (49 U.S.C. 114(d)(1)-(2), (e)(1), (f)(1)-(3), (6)-(8) and (10)-(11)).

In addition to creating the TSA and specifying its responsibilities, the ATSA also ensured that certain

information acquired or developed in the conduct of security activities, the dissemination of which could potentially be harmful, would be shielded from public disclosure. A pre-existing statute, 49 U.S.C. 40119(b) (2000), had instructed the Federal Aviation Administration that, "notwithstanding" the Freedom of Information Act (FOIA), 5 U.S.C. 552, it was required to "prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities under" certain security-related provisions of Title 49, if it determined that "disclosing the information would * * * be an unwarranted invasion of personal privacy," "reveal a trade secret or privileged or confidential commercial or financial information," or "be detrimental to the safety of passengers in air transportation." See Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 1117; see also Antihijacking Act of 1974, Pub. L. No. 93-366, § 316, 88 Stat. 417. Pursuant to that congressional mandate, the Federal Aviation Administration had promulgated detailed regulations designating certain information as "Sensitive Security Information" (SSI) and restricting the dissemination of such information. See, *e.g.*, 14 C.F.R. Pt. 191 (1976); 14 C.F.R. Pt. 191 (2000). The ATSA reassigned the duty to promulgate those regulations to the TSA, § 101(e), 115 Stat. 603, and the SSI regulations were subsequently transferred over to the TSA's authority, see 67 Fed. Reg. 8351 (Feb. 22, 2002).

The Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, Tit. IV, Subtit. A, § 403(2), 116 Stat. 2178, moved the TSA into the newly created Department of Homeland Security. A separate provision of that Act, currently codified at 49 U.S.C. 114(r), expanded upon

the TSA's statutory mandate to prohibit the disclosure of sensitive information. See HSA, Tit. XVI, § 1601(b), 116 Stat. 2312; see also Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Tit. V, § 568, 121 Stat. 2092 (moving former Section 114(s) to Section 114(r)). Section 114(r)(1) provides:

> Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would—
>
> (A) be an unwarranted invasion of personal privacy;
>
> (B) reveal a trade secret or privileged or confidential commercial or financial information; or
>
> (C) be detrimental to the security of transportation.

Congress also amended Section 40119(b) itself to impose substantially similar obligations on the Secretary of Transportation. HSA, Tit. XVI, § 1601(a), 116 Stat. 2312.

In 2003, when the events giving rise to this case occurred, the TSA's SSI regulations generally defined SSI to include, *inter alia*, "[a]ny approved, accepted, or standard security program" adopted under certain regulations; "Security Directives and Information Circulars" promulgated under certain regulations; "[a]ny selection criteria used in any security screening process, including for persons, baggage, or cargo";

"[a]ny security contingency plan or information and any comments, instructions, or implementing guidance pertaining thereto"; the technical specifications of certain security equipment (such as screening equipment); and "[s]pecific details of aviation security measures, * * * includ[ing] * * * information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 C.F.R. 1520.7(a)-(f) and (j) (2002); see 67 Fed. Reg. at 8340. The regulations generally prohibited the disclosure of SSI unless the recipient had a "need to know" the information, 49 C.F.R. 1520.5(a) (2002); specifically defined the circumstances in which an individual had such a "need to know," see 49 C.F.R. 1520.5(b) (2002); and stated that an unauthorized disclosure was "grounds for a civil penalty and other enforcement or corrective action." 49 C.F.R. 1520.17; see 49 C.F.R. 1520.5(d) (2002).

The TSA's current SSI regulations, as well as the SSI regulations separately promulgated by the Department of Transportation, are substantially similar (but include some new categories of SSI that have been added over the last decade). See 49 C.F.R. 1520.5, 1520.9(a)(2), 1520.17 (TSA); see also 49 C.F.R. Pt. 15 (Department of Transportation). The TSA often designates particular information as SSI without seeking to have it formally classified under the President's Article II national-security powers, in order that the information can, if necessary, be shared quickly and securely with non-government personnel (such as airport and airline employees) whose cooperation is critical to ensuring transportation security, even if those recipients are not cleared for more sensitive classified information. See, *e.g.*, 70 Fed. Reg.

1380 (Jan. 7, 2005) (stating that an "original intent" of the SSI regulations was "to share vulnerability assessments and threat information with entities in all transportation modes that need the information to help forestall future attacks"). Since 2009, Section 114(r) has made clear that "[n]othing in this subsection, or any other provision of law, shall be construed to authorize the designation of information as sensitive security information" in order to "conceal a violation of law, inefficiency, or administrative error"; "prevent embarrassment to a person, organization, or agency"; "restrain competition"; or "prevent or delay the release of information that does not require protection in the interest of transportation security, including basic scientific research information not clearly related to transportation security." 49 U.S.C. 114(r)(4)(A)-(D); see American Communities' Right to Public Information Act, Pub. L. No. 111-83, § 561(c)(1), 123 Stat. 2182 (2009); see also 49 U.S.C. 40119(b) (similar limitations on the Department of Transportation's authority).

2. Respondent is a former federal air marshal who was hired by the TSA in 2001. App., *infra*, 2a. Under the federal air marshal program, which was established by the ATSA, the TSA stations federal air marshals on passenger flights in order to protect those flights from high security risks. 49 U.S.C. 44917(a)(1)-(2); see ATSA, § 105(a), 115 Stat. 606. The TSA has discretionary authority to deploy federal air marshals on any flight, and it is required to station a federal air marshal on any flight that, in the agency's judgment, "present[s] high security risks." 49 U.S.C. 44917(a)(1)-(2); see ATSA, § 105(a), 115 Stat. 606.

In 2003, the TSA briefed respondent on a "potential plot" to hijack United States airliners. App., *infra*, 2a (citation omitted). Shortly thereafter, he received a text message from the TSA stating that, for a particular window of time, the TSA would not be deploying federal air marshals on overnight missions from Las Vegas. *Ibid.*; *id.* at 21a n.1. Respondent informed both his supervisor and the Office of the Inspector General for the Department of Homeland Security of his personal view that the TSA's decision about how to deploy its air marshals was not in the best interests of public safety, but he was not satisfied with the responses he received. *Id.* at 21a-22a.

Respondent then decided to reveal the TSA's deployment plans to the news media, in an effort to "create a controversy" that would force the TSA to change them. App., *infra*, 2a (citation omitted). He told an MSNBC reporter about the TSA's plans, and the reporter published an article exposing those plans to the public and criticizing them. *Ibid.* Members of Congress and others criticized the plans. *Ibid.* The TSA ultimately did not follow the course of action that had been outlined in the original text message. *Ibid.*

The TSA was not aware initially that respondent had been the source of the disclosure. App., *infra*, 2a. It learned of his involvement, however, when respondent appeared on the NBC Nightly News to discuss a separate incident, in a disguise that proved to be inadequate. *Ibid.* The TSA removed respondent from his position as a federal air marshal for disclosing SSI without authorization. *Ibid.*

3. Respondent challenged his removal before the Merit Systems Protection Board (MSPB), "an independent Government agency that operates like a

court" and has jurisdiction to review certain personnel actions. 5 C.F.R. 1200.1; see, *e.g.*, 5 U.S.C. 7513(d). One of respondent's claims was that his removal had violated 5 U.S.C. 2302(b)(8)(A). App., *infra*, 3a. Under Section 2302(b)(8)(A), an agency generally cannot "take * * * a personnel action" against an employee for disclosing certain types of information, when the employee "reasonably believe[d]" that the information showed a "violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. 2302(b)(8)(A)(i) and (ii). Section 2302(b)(8)(A) does not apply, however, if the employee's disclosure was "specifically prohibited by law."

The MSPB ultimately rejected respondent's Section 2302(b)(8)(A) argument and sustained the agency's decision to remove him. App, *infra*, 19a-56a. The MSPB recognized that the TSA, pursuant to a legislative mandate to prescribe regulations preventing the disclosure of certain types of information, had promulgated regulations that "identified SSI subject to * * * statutory nondisclosure as including information relating to [federal-air-marshal] deployments." *Id.* at 33a.[*] It additionally observed that the Ninth

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[*] In the MSPB's view, the relevant legislative mandate was the version of 49 U.S.C. 40119(b) that was in effect when the TSA initially promulgated the regulations. App., *infra*, 33a n.9. The briefs and decisions in this case have accordingly focused on Section 40119(b). However, at the time of respondent's disclosure, the statute requiring and authorizing the TSA's SSI regulations was actually the provision now codified in Section 114(r). See pp. 4-5, *supra*. For that reason, and for the sake of simplicity, this petition will focus on Section 114(r). In any event, because the language of

Circuit, in a separate proceeding that respondent had initiated, had "unequivocally declared that the information disclosed by [him] constituted SSI as defined in those regulations." *Ibid.*; see *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1150 (2008); 49 C.F.R. 1520.7(j) (2002) (defining SSI to include "information concerning specific numbers of Federal Air Marshals, deployments or missions"). The MSPB accordingly reasoned that because respondent had "disclosed information that is specifically prohibited from disclosure by a regulation promulgated pursuant to an express legislative directive from Congress to TSA," the "disclosure was 'specifically prohibited by law'" for purposes of Section 2302(b)(8)(A). App., *infra*, 34a-35a.

4. The Federal Circuit vacated the MSPB's decision and remanded for further proceedings. App., *infra*, 1a-18a; see 5 U.S.C. 7703(a)(1) (authorizing an employee to seek Federal Circuit review of an adverse MSPB decision). The court of appeals recognized that respondent's removal had reflected a proper application of the TSA's regulations. App., *infra*, 5a-7a. It also recognized that removal had been a reasonable penalty for a disclosure that had "compromised flight safety" and "could have had catastrophic consequences." *Id.* at 7a-9a. The court concluded, however, that respondent's disclosure had not been "specifically prohibited by law" and that he was therefore entitled to invoke the protections of Section 2302(b)(8)(A). *Id.* at 10a-17a.

In reaching that conclusion, the court of appeals focused on the text of the statute requiring the promul-

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the two statutes is nearly identical, the legal analysis would be the same under either one.

gation of the SSI regulations, rather than on the regulations themselves. App., *infra*, 10a-17a. In the court's view, the parties were in agreement that "in order to fall under the * * * 'specifically prohibited by law' proviso," a "disclosure must be prohibited by a statute rather than by a regulation." *Id.* at 12a; see *id.* at 13a (perceiving the parties to agree that "a regulation * * * cannot be 'law'"). The court also relied on a Senate Report addressing an unenacted version of Section 2302(b)(8) that contained the phrase "prohibited by statute" rather than the phrase "specifically prohibited by law." *Id.* at 13a-14a (citing S. Rep. No. 969, 95th Cong., 2d Sess. 21 (1978) (Senate Report)); see Senate Report 154.

The court of appeals ultimately acknowledged, however, that "[r]egulations promulgated pursuant to Congress's express instructions *would* qualify as specific legal prohibitions." App., *infra*, 15a (emphasis added). And it viewed the legislative mandate to promulgate SSI regulations to present "a very close case," because the mandate included a direct "charge" to the agency "to prescribe regulations pursuant to specific criteria (i.e., only information that would be detrimental to transportation safety)." *Ibid.* But the court nevertheless concluded that, because the statute "gives some discretion to the Agency to fashion regulations for prohibiting disclosure," the statute's criteria were too "general" to "'specifically prohibit' employee conduct." *Id.* at 14a.

Having decided the critical legal question, the court of appeals remanded the case for a determination whether respondent had reasonably believed his disclosure evidenced "a substantial and specific danger to public health or safety" or one of the other subjects

listed in Section 2302(b)(8)(A). App., *infra*, 16a. Judge Wallach concurred to express the view that "the facts alleged, if proven, allege conduct at the core of" the activity protected by that provision. *Id.* at 18a. The court of appeals denied the government's petition for rehearing en banc. *Id.* at 165a-166a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision seriously undermines the effectiveness of the congressionally mandated SSI regime, invites individual federal employees to make disclosures that will threaten public safety, and warrants this Court's immediate review. In the course of its efforts to secure the Nation's transportation network, the TSA necessarily develops and acquires a great deal of information, including information about security vulnerabilities, that has the potential to cause extreme harm if publicly disclosed. In recognition of that fact, Congress directed that the TSA "shall prescribe regulations" prohibiting disclosures that would, in the expert judgment of the TSA, "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(C). The decision in this case, however, effectively permits individual federal employees to override the TSA's judgments about the dangers of public disclosure.

According to the court of appeals, no matter how harmful it might be for particular SSI to fall into the wrong hands, an employee cannot be disciplined for publicizing that SSI, so long as he reasonably believes that the disclosure serves one of the interests listed in 5 U.S.C. 2302(b)(8)(A). The decision below thus clears a path for any employee to do what respondent did here: go public with an internal disagreement about how best to allocate finite security resources; put lives

in danger by identifying the areas that have received fewer resources; and then attempt to avoid any employment-related repercussions by claiming that publicizing such vulnerabilities revealed "a substantial and specific danger to public health or safety," 5 U.S.C. 2302(b)(8)(A)(ii).

That result contravenes the manifest intent of Congress. The protections of Section 2302(b)(8)(A) expressly do not apply to disclosures that are "specifically prohibited by law." That proviso squarely encompasses disclosures of SSI, which have been prohibited pursuant to an express congressional directive. Employees can instead raise concerns that implicate SSI through a separate set of procedures, covered by Section 2302(b)(8)(B), that allow such concerns to be addressed without harmful public disclosures. This Court should grant certiorari and reverse.

A. The Disclosure Of Sensitive Security Information Is "Specifically Prohibited By Law" Within The Meaning Of 5 U.S.C. 2302(b)(8)(A)

The Federal Circuit erred in permitting respondent to invoke 5 U.S.C. 2302(b)(8)(A) as a defense to his removal. Section 2302(b)(8)(A) does not apply when an employee has revealed information the disclosure of which is "specifically prohibited by law." 5 U.S.C. 2302(b)(8)(A). Respondent's disclosure here falls squarely within that proviso.

1. The TSA had at the time of respondent's disclosure and has today a statutory obligation to promulgate regulations "prohibiting * * * disclosure[s] of information" that would, in the TSA's judgment, "be detrimental to the security of transportation." HSA, Tit. XVI, § 1601(b), 116 Stat. 2312; see 49 U.S.C. 114(r). Consistent with that statutory obligation, the

TSA has promulgated detailed regulations restricting the dissemination of SSI. 67 Fed. Reg. 8351 (Feb. 22, 2002). Those regulations expressly foreclosed respondent from sharing "information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations" with unauthorized persons. 49 C.F.R. 1520.7(j) (2002); see 49 C.F.R. 1520.5(a) (2002); see also App., *infra*, 5a-7a (concluding that respondent violated a nondisclosure prohibition); *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1150 (9th Cir. 2008) (same). Respondent's disclosure of air-marshal-deployment information was thus "specifically prohibited by law" within the meaning of Section 2302(b)(8)(A).

The regulatory prohibition that respondent violated in this case is not meaningfully distinguishable from other legal prohibitions that, even in the court of appeals' view, would be sufficient to render Section 2302(b)(8)(A) inapplicable. The court of appeals accepted, for example, that the "specifically prohibited by law" proviso would be satisfied by the Trade Secrets Act, 18 U.S.C. 1905. See App., *infra*, 14a-15a. That Act prohibits the disclosure of information that "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association." 18 U.S.C. 1905. A bar on disclosing information about the "operations" of a "corporation," *ibid.*, is no more specifically prohibitory than a bar on disclosing information about "specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations," 49 C.F.R. 1520.7(j)

(2002). Indeed, it is difficult to see how the provisions that respondent violated in this case could have prohibited the disclosure of air-marshal-deployment information with any greater clarity or specificity.

The prohibition against respondent's disclosure was a prohibition "by law" whether it appeared directly in the statute or instead in the regulations that the statute required the TSA to promulgate. As Congress presumably understood, the term "law" is not limited to congressional enactments. In *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), for example, this Court construed the phrase "authorized by law" to include not just authorization conferred by statute, but also by "properly promulgated, substantive agency regulations." *Id.* at 295. The Court observed that such regulations "have the 'force and effect of law'" and that, in the absence of a "clear showing of contrary legislative intent," the "traditional understanding" of the phrase "'authorized by law'" would presumptively include them. *Id.* at 295-296 (citation omitted).

In the context of Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso, the "traditional understanding" of the word "law" would include, at a minimum, substantive nondisclosure regulations, like the SSI regulations, that were enacted pursuant to an express congressional directive. See *Chrysler Corp.*, 441 U.S. at 308 (concluding that the phrase "authorized by law" would be satisfied by a procedurally valid authorizing regulation enacted pursuant to a statute that "contemplates the regulations issued"). And nothing in Section 2302(b)(8)(A)'s history provides a "clear showing of contrary legislative intent," *id.* at 296, that would justify disregarding that traditional understanding. Indeed, the history shows that Con-

gress specifically decided not to adopt a proposal by the Senate that would have used the word "statute" rather than the word "law." See Senate Report 154; H.R. Conf. Rep. No. 1717, 95th Cong., 2d. Sess. 130 (1978) (Conference Report).

The government has not disputed, for purposes of this case, that *some* regulatory prohibitions could fall outside the reach of Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso. See Gov't C.A. Br. 46. The conference report accompanying the proviso's enactment states that the proviso "does not refer to agency rules and regulations" but instead "to statutory law and court interpretations of those statutes." Conference Report 130. The phrase "agency rules and regulations," however, cannot be taken to encompass congressionally mandated regulations like the ones at issue here. As the court of appeals recognized (App., *infra*, 14a), Congress was apparently concerned with the possibility that agencies might adopt "*internal procedural* regulations against disclosure" that would "discourage an employee from coming forward with allegations of wrongdoing." Senate Report 21 (emphasis added). That concern would not apply to nondisclosure regulations that Congress *itself* expressly instructed the agency to promulgate. Such regulations "implement the statute," *Chrysler Corp.*, 441 U.S. at 302-303 (citation omitted), and thus would have been considered by Congress to be part of "statutory law" for Section 2302(b)(8)(A) purposes.

To the extent the Federal Circuit believed that the government waived the argument that the regulations in this case can be "law" for purposes of the Section 2302(b)(8)(A) proviso, that belief was incorrect. The government's argument in the court of appeals did

focus principally on the statute as the relevant source of "law." See, *e.g.*, Gov't C.A. Br. 45 (explaining that the MSPB had held that "the 'law' that specifically prohibits the disclosure of SSI is the statute passed by Congress"); *id.* at 46-47 (agreeing that the proviso applies only when Congress has "explicitly prohibited" a particular disclosure "via legislative enactment" and characterizing the dispute as "whether 49 U.S.C. § 40119 serves as that legislative enactment") (internal quotation marks and citation omitted). But the government also expressly defended the proposition that "when an agency has adopted non-disclosure regulations pursuant to a specific Congressional mandate to do so, the agency may discipline the employee who violates that non-disclosure regulation." *Id.* at 48; see, *e.g.*, *id.* at 45 (arguing that the disclosure of SSI "was both 'specifically prohibited by' 49 U.S.C. § 40119, *as well as by the TSA regulation*") (emphasis added); *id.* at 46 (describing the MSPB's decision, which the government was defending, as "encompass[ing] regulations * * * to the extent that those regulations implement a specific statutory requirement that an agency describe the information that must be protected"). And the court of appeals itself acknowledged that "[r]egulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions." App., *infra*, 15a. It erred in failing to apply that principle to the regulations here.

2. Even if the relevant inquiry were restricted to the four corners of the statute, the disclosure in this case would still have been "specifically prohibited by law" within the meaning of Section 2302(b)(8)(A). Section 114(r) sets forth three "specific[]" categories

of information: information whose disclosure, in the TSA's judgment, would "be an unwarranted invasion of personal privacy"; information whose disclosure, in the TSA's judgment, would "reveal a trade secret or privileged or confidential commercial or financial information"; and information whose disclosure would, in the TSA's judgment, "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(A)-(C). And Section 114(r) "prohibit[s]" the disclosure of that information by providing that the TSA "shall prescribe regulations" to that effect. 49 U.S.C. 114(r)(1).

The Federal Circuit's view (App., *infra*, 14a) that the statute "does not 'specifically prohibit'" disclosures because it "provides only general criteria for withholding information and gives some discretion to the Agency" cannot be squared with this Court's decision in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975). That case involved a provision of the FOIA, known as Exemption 3, which at that time permitted an agency to withhold from the public any information "specifically exempted from disclosure by statute." *Id.* at 257 (quoting 5 U.S.C. 552(b)(3) (1970)). The Court construed Exemption 3 to apply even in circumstances where an agency's discretionary decision was a prerequisite to nondisclosure. *Id.* at 261-267; see *id.* at 258 n.4. In particular, the Court found the provision applicable to information that became nondisclosable only after the relevant agency had made a "judgment" that disclosure was "not required in the interest of the public" and "would adversely affect the interests" of someone objecting to the disclosure. *Id.* at 258 n.4 (quoting 49 U.S.C. 1504 (1970)). The proviso at issue here ("specifically prohibited by law") is at least as broad as the proviso at issue in

Robertson ("specifically exempted from disclosure by statute"); the degree of agency discretion here is, if anything, narrower than the degree of agency discretion in *Robertson*; and the applicability of the proviso here thus follows *a fortiori* from *Robertson*.

In the wake of *Robertson*, Congress narrowed the language of FOIA's Exemption 3 to apply only to information "specifically exempted from disclosure by statute (other than section 552b of this title), *provided that* such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3) (1976) (emphasis added); see *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 121 n.18 (1980). But when Congress enacted Section 2302(b)(8)(A) shortly thereafter, it included a "specifically prohibited by law" proviso that was not subject to any such limitations. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1116. The natural inference is that Congress intended the "specifically prohibited by law" proviso in Section 2302(b)(8)(A) to be interpreted at least as broadly as the "specifically exempted from disclosure by statute" proviso at issue in *Robertson*. See, *e.g.*, *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 589-590 (2010) ("We have often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'") (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)).

The legislative history of Section 2302(b)(8)(A) supports that inference. As noted above, the Senate proposed a version of the proviso that would have applied only to disclosures "prohibited by statute." Senate Report 154. The Senate Report accompanying that proposal expressed the view that the proviso should be limited to the types of statutes covered by the amended Exemption 3. *Id.* at 21. But Congress rejected the Senate's proposal in favor of the language proposed by the House, which used the phrase "specifically prohibited by law." H. Rep. No. 1403, 95th Cong., 2d Sess. 126 (1978); Conference Report 130. Even if adoption of the Senate version would have implied the existence of the various nontextual limitations to which the Senate Report referred, rejection of the Senate's version implies the opposite.

In any event, assuming *arguendo* that the Section 2302(b)(8)(A) proviso did incorporate those implicit limitations, the legislative mandate to promulgate the SSI regulations would satisfy them. Even under the Senate Report's restrictive view, "a statute which establishes particular criteria for withholding or refers to particular types of matters to be withheld" would be sufficient to render Section 2302(b)(8)(A) inapplicable. Senate Report 21. The legislative mandate here, which describes specific categories of information that the TSA is required to keep confidential, "refers to particular types of matters to be withheld." And it compares favorably in those respects with a statute that the Senate Report specifically identified as one that would satisfy the proviso, "section 102(d)(3) of the National Security Act of 1947." *Id.* at 21-22; see *CIA* v. *Sims*, 471 U.S. 159, 167-168 (1985) (agreeing with the "uniform view among other

federal courts" that Section 102(d)(3) is "a withholding statute under Exemption 3"). Section 102(d)(3) provided that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. 403(d)(3) (1976). The legislative mandate here—which expressly directs the TSA to prohibit the disclosure of three particular categories of information in a particular manner (promulgation of regulations)—is no less specific or prohibitory.

3. The Federal Circuit's conclusion that respondent can invoke the protections of Section 2302(b)(8)(A) undermines the careful line that Congress drew between concerns that an employee may air in public and those that he may not. The general purpose of Section 2302(b)(8) is to "encourage government personnel to blow the whistle on wasteful, corrupt or illegal government practices without fearing retaliatory action by their supervisors or those harmed by the disclosures." *Marano* v. *Department of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993). But that general purpose is limited by a countervailing concern that employees not publicly reveal information that has legitimately been shielded from public view for reasons unrelated to whistleblowing.

Under Section 2302(b)(8), any employee who comes across information that he "reasonably believes" shows a "violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" can raise his concerns without fear of employment-related reprisal. 5 U.S.C. 2302(b)(8)(A)(i) and (ii), (B)(i) and (ii). But the manner in which he may raise those concerns depends

upon whether the disclosure of information is "specifically prohibited by law" (or "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs"). 5 U.S.C. 2302(b)(8)(A). If no such prohibition exists, then there is no reason to believe that any harm to the public interest caused by public disclosure will be significant enough to outweigh the benefits of public debate, and the employee may go public with the information. See *ibid.*

If such a prohibition does exist, however, Section 2302(b)(8) does not permit the employee himself to decide whether the benefits of public disclosure outweigh the interests animating the prohibition against it. Instead, the employee must raise his concerns through internal channels: he may go either "to the Inspector General of [the] agency or another employee designated by the head of the agency to receive such disclosures" or "to the Special Counsel," who operates independently of the agency. 5 U.S.C. 2302(b)(8)(B); see 5 U.S.C. 1211-1212. Those channels provide substantial procedures for the exposure of problems within an agency that warrant corrective action, while at the same time respecting the need to shield particular information from public view.

If, for example, the employee goes to the Special Counsel, the Special Counsel is required to evaluate the information within 15 days, 5 U.S.C. 1213(b); may compel the agency to investigate the matter and file a written report, 5 U.S.C. 1213(c)-(d); and must transmit the report (generally along with any comments from the employee whose disclosure initiated the investigation) to the President, relevant congressional committees, and, potentially, other agencies (such as

the Department of Justice), 5 U.S.C. 1213(e). Under the Federal Circuit's decision, however, an employee may disregard those procedures and individually choose to make public disclosures that the TSA has legitimately determined, in response to a congressional directive, to "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(C). The Federal Circuit's decision is erroneous and should be reversed.

B. The Federal Circuit's Erroneous Decision Warrants Immediate Review

1. The court of appeals' decision creates grave public-safety concerns that warrant this Court's immediate intervention. The court's holding that an employee who discloses SSI may invoke Section 2302(b)(8)(A) as a defense to a resulting employment action will embolden federal employees to disclose SSI. The TSA estimates that it has more than 65,000 employees with access to SSI. Disclosures by such employees will, as judged by the expert agency designated by Congress for the task, be "detrimental to the security of transportation," 49 U.S.C. 114(r)(1)(C), and create serious risks to transportation safety.

Information classified as SSI includes "[s]ecurity programs and contingency plans"; "[s]ecurity [d]irectives"; specifications of security equipment and procedures; "[v]ulnerability assessments"; methods used to detect threats; operational and technical details of particular security measures; security screening procedures; "[s]ecurity training materials"; "[i]dentifying information of certain transportation security personnel"; and lists of systems and assets "the incapacity or destruction of [which] would have a debilitating impact on transportation security." 49 C.F.R. 1520.5(b)(1)-(2), (4)-(5) and (7)-(12) (emphasis omitted).

Any of that information, if improperly disclosed, could present a serious threat to the security of the Nation's transportation network and put lives at risk.

Armed with such information, someone might, for example, gain the ability to circumvent existing security measures, evade existing threat-detection procedures, or pinpoint specific vulnerabilities in the national transportation network. As the Federal Circuit recognized, respondent's own disclosure of flights that would not be protected by federal air marshals "compromised flight safety," created a "threat to public safety," and "could have had catastrophic consequences." App., *infra*, 8a. Even information that might not appear on its face to expose a security vulnerability (say, the fact that a particular federal air marshal will be on a particular flight) could potentially be exploited to create one (say, by interfering with the air marshal's ability to make the flight). It will not always be possible, as it was in this case, for the TSA to shift its plans in time to eliminate the disclosed vulnerability. Even when it is possible to do so, the effort may, as in this case, "force[] the Agency to reallocate scarce resources," *ibid.*, thereby diminishing the resources available in areas that the agency initially determined to be more critical. And a disclosure of information about screening technology, for example, would require major investments of time, resources, and infrastructure improvements to remedy; could take months, if not years, to complete; and would require considerable expenditure of federal funds.

The Federal Circuit attempted to downplay the impact of its decision by pointing out that the government may still "discipline employees who reveal SSI for personal gain or due to negligence, or who disclose

information that the employee does not reasonably believe evidences a substantial and specific danger to public health or safety." App., *infra*, 16a-17a. But that is cold comfort. SSI, by its very nature, concerns security matters. Employees will thus frequently be able to claim that they are publicly disclosing SSI in an effort to expose flaws in transportation security. Many of those employees may later be deemed by the MSPB, or a court, to have had a "reasonabl[e] belie[f]" that the disclosure "evidences * * * a substantial and specific danger to public health or safety," 5 U.S.C. 2302(b)(8)(A)(ii), or another type of "reasonabl[e] belie[f]" that qualifies for protection under Section 2302(b)(8)(A). Even if some of those employees' claims are not ultimately deemed to be within the scope of Section 2302(b)(8)(A), the increased likelihood of that result will itself erode the SSI scheme's deterrent effect and encourage more disclosures, which are immediately harmful whether or not the responsible employee is ultimately subject to disciplinary action.

2. Certiorari is warranted notwithstanding the absence of a circuit conflict on the question presented. The Federal Circuit has outsized influence in this area, and the potential for a circuit conflict ever to develop is more theoretical than real.

An employee's challenge to a personnel action under Section 2302(b)(8)(A) is generally channeled to the MSPB. See, *e.g.*, 5 U.S.C. 7513(d) (MSPB jurisdiction over appeals of adverse actions against covered employees); 5 U.S.C. 1214(a)(3) (MSPB jurisdiction to hear Section 2302(b)(8) claims that the Special Counsel terminates or does not timely act upon). The MSPB has generally viewed Federal Circuit prece-

dent to be controlling. See, *e.g.*, *Garcia* v. *Department of Agric.*, 110 M.S.P.R. 371, 379-380 (2009). And, except in cases involving antidiscrimination claims, MSPB decisions have historically been reviewable only in the Federal Circuit. See 5 U.S.C. 7703(b)(1) (2006).

In the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, Tit. I, § 108, 126 Stat. 1469-1470, Congress established a two-year window (which expires at the end of 2014) during which certain Section 2302(b)(8) cases can be appealed not only to the Federal Circuit, but to "any court of appeals of competent jurisdiction." 5 U.S.C. 7703(b)(1)(B). In light of that temporary provision, the MSPB has relaxed its view that Federal Circuit precedent is necessarily controlling in such cases. See *Day* v. *Department of Homeland Sec.*, 119 M.S.P.R. 589, 595 n.5 (2013) (declining to follow a Federal Circuit decision that represented a "minority approach among the courts of appeal"). But the government is unaware of any case involving the question presented that is on track to be decided before the two-year window expires. In any event, even during the two-year window, an employee could still elect to appeal any MSPB decision in the government's favor to the Federal Circuit, which will then be bound by the decision in this case. See App., *infra*, 165a-166a (denying rehearing en banc); 5 U.S.C. 7703(b)(1)(B).

It is, moreover, unlikely that another good vehicle for addressing the question presented will arise, because the Federal Circuit's decision will deter federal officials in the future from attempting to discipline an employee who discloses SSI and appears to have a colorable Section 2302(b)(8)(A) defense. Under 5

U.S.C. 1215(a), the independent Special Counsel is empowered to bring a case before the MSPB seeking *personal* sanctions against any agency official who takes action against an employee in violation of Section 2302(b)(8). The potential sanctions include removal of the official, debarment from federal employment, and monetary penalties up to $1000. 5 U.S.C. 1215(a)(3)(A)(i) and (ii). A federal official is unlikely to risk such personal repercussions simply to provide another vehicle for this Court's review. As a result, future SSI disclosures may go unchecked (and thus would not generate litigation). And even assuming the government could raise the question presented again at a later date, the delay would provide additional opportunity for harmful disclosures that could endanger public safety. This Court should accordingly grant certiorari now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2011-3231

ROBERT J. MACLEAN, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY, RESPONDENT

OPINION

Apr. 26, 2013

Before: PROST, MOORE, and WALLACH, Circuit Judges.

Opinion for the court filed by Circuit Judge MOORE. Concurring opinion filed by Circuit Judge WALLACH.

MOORE, Circuit Judge.

Robert J. MacLean petitions for review of a final decision of the Merit Systems Protection Board (Board), which sustained the Transportation Security Administration's (Agency's) removal of Mr. MacLean from the position of Federal Air Marshal (Marshal). *See MacLean v. Dep't of Homeland Sec.*, 116 M.S.P.R. 562 (2011) (*MacLean II)*. Because the Board incor-

rectly interpreted the Whistleblower Protection Act (WPA), we *vacate* and *remand*.

BACKGROUND

Mr. MacLean became a Marshal in 2001. In July 2003, all Marshals received a briefing from the Agency that there was a "'potential plot' to hijack U.S. Airliners." *MacLean II*, 116 M.S.P.R. at 564. Soon after that briefing, however, the Agency sent an unencrypted text message to the Marshals' cell phones cancelling all missions on flights from Las Vegas until early August. After receiving this directive, Mr. MacLean became concerned that "suspension of overnight missions during a hijacking alert created a danger to the flying public." *Id.* He complained to his supervisor and to the Office of Inspector General, but they responded that nothing could be done. J.A. 212-13. Dissatisfied, Mr. MacLean told an MSNBC reporter about the directive so as to "create a controversy resulting in [its] rescission." *MacLean II*, 116 M.S.P.R. at 565. MSNBC published an article criticizing the directive, and the Agency withdrew it after several members of Congress joined in the criticism.

In 2004, Mr. MacLean appeared on NBC Nightly News in disguise to criticize the Agency dress code, which he believed allowed Marshals to be easily identified. However, someone from the Agency recognized his voice. During the Agency's subsequent investigation, Mr. MacLean admitted that he revealed the cancellation directive to an MSNBC reporter in 2003. Eventually, Mr. MacLean was removed from his position because his contact with the MSNBC reporter

constituted an unauthorized disclosure of sensitive security information (SSI). Although the Agency had not initially labeled the text message as SSI when it was sent, it subsequently issued an order stating that its content was SSI.

Mr. MacLean challenged the SSI order in the Ninth Circuit as a violation of the Agency's own regulations and as an impermissible retroactive action, but the court rejected Mr. MacLean's challenges. *MacLean v. Dep't of Homeland Sec.*, 543 F.3d 1145, 1150-52 (9th Cir. 2008). It held that substantial evidence supported designating the text message as SSI under the applicable regulations, *id.* at 1150, and that the Agency did not engage in retroactive action because it "applied regulations . . . in force in 2003" to determine that the text message was SSI, *id.* at 1152.

Mr. MacLean challenged his removal before the Board, arguing that his disclosure of the text message was protected whistleblowing activity. After an interlocutory appeal from the Administrative Judge (AJ), the full Board determined that Mr. MacLean's disclosure fell outside the WPA because it was "specifically prohibited by law." 5 U.S.C. § 2302(b)(8)(A) (2008). The Board reasoned that the regulation prohibiting disclosure of SSI, upon which the Agency relied when it removed Mr. MacLean, had the force of law. *MacLean v. Dep't of Homeland Sec.*, 112 M.S.P.R. 4, 12-18 (2009) (*MacLean I*).

The AJ then upheld Mr. MacLean's removal and the Board affirmed in *MacLean II*, the decision now on appeal. Reconsidering *MacLean I*, the Board ex-

plained that a regulation is not a "law" within the meaning of the WPA. Instead, the Board held that the disclosure of the text message could not qualify for WPA protection because it was directly prohibited by a *statute*, the Aviation and Transportation Security Act (ATSA). *MacLean II*, 116 M.S.P.R. at 570-71.

The Board also determined that the AJ applied the correct regulation in upholding the Agency's removal of Mr. MacLean, and that the penalty of removal was reasonable. Moreover, the Board upheld the AJ's finding that the Agency did not terminate Mr. MacLean in retaliation for his activities on behalf of the Federal Law Enforcement Officers Association (FLEOA) because the unauthorized disclosure of SSI was a non-retaliatory reason for removal. Therefore, the Board sustained the removal.

This appeal followed. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

We must affirm the Board's decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2012). We review the Board's legal determinations *de novo*. *Welshans v. U.S. Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008).

I. Application of Agency Regulations to Mr. MacLean's Removal

The Board explained that, "[u]nder the regulations in effect in July 2003, information relating to the deployment of [Marshals] was included within the definition of SSI," and concluded that, as a result, Mr. MacLean's communication with a reporter constituted an unauthorized disclosure. *MacLean II*, 116 M.S.P.R. at 569. Mr. MacLean argues, however, that the Board erred by upholding his removal because he was not charged under the right regulation. He explains that the regulation quoted in the initial charge, 49 C.F.R. § 1520.5(b)(8)(ii), was not in force in 2003 and only became codified in 2005. Mr. MacLean contends that the Board wrongly concluded that the regulation it ultimately relied on to uphold his removal, 49 C.F.R. § 1520.7(j), which *was* in force in 2003, is the same as the 2005 regulation. Mr. MacLean argues that the Board violated the rule of *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943), because the Board affirmed his removal on grounds different from those under which he was initially charged by the deciding official.

Mr. MacLean also maintains that, although the Ninth Circuit upheld the Agency's eventual designation of the text message as SSI, his removal violated his due process rights because the message was not labeled SSI when it was sent. He argues that the termination was improper because he did not know that he was violating any Agency rules by revealing the content of the text message. Mr. MacLean admits that

he signed a nondisclosure agreement as a condition of his employment, which states that Marshals "may be removed" for "[u]nauthorized release of security-sensitive or classified information." *MacLean II*, 116 M.S.P.R. at 580. He argues, however, that he believed that the message was not SSI and that, in any event, he was protected as a whistleblower. Repeating the argument rejected by the Board, Mr. MacLean thus insists that he tried in good faith to proceed within the law.

We do not find Mr. MacLean's arguments challenging the Agency's charge to be persuasive. The regulation that the Board ultimately relied upon to uphold Mr. MacLean's removal, 49 C.F.R. § 1520.7(j) (2002), is no different from the regulation under which he was initially charged, 49 C.F.R. § 1520.5(b)(8)(ii) (2005). The earlier regulation bars disclosing "[s]pecific details of aviation security measures," including "infor-mation concerning specific numbers of [Marshals], deployments or missions," while the latter prohibits revealing "specific details of aviation . . . security measures" and "[i]nformation concerning deployments." In fact, the regulation's history shows that § 1520.5(b)(8)(ii) is simply a recodified version § 1520.7(j). *See* J.A. 36. Because the Agency removed Mr. MacLean for revealing SSI, and the Board affirmed the termination for that same reason, the Board did not violate the *Chenery* doctrine.

We likewise reject Mr. MacLean's due process and "good faith" arguments. Both the applicable regulation and the nondisclosure agreement that Mr. Mac-

Lean signed put him on notice that revealing information concerning coverage of flights by Marshals could lead to termination. Thus, the Agency did not violate due process even though it formally designated the text message as SSI only after it was sent. Furthermore, we agree with the government that, because the regulation prohibiting disclosure of SSI does not include an intent element, Mr. MacLean cannot be exonerated by his subjective belief that the content of the text message was not SSI or that he was protected as a whistleblower.

II. Reasonableness of Mr. MacLean's Removal

Mr. MacLean argues that the Board failed to adequately analyze the factors listed in *Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 305-06 (1981), for possible mitigation of the penalty of removal. Mr. MacLean contends that the Board did not take into account the fact that he was a one-time offender and otherwise had an unblemished record. Mr. MacLean also argues that *Douglas's* "comparative discipline" factor did not weigh in favor of removal because other Marshals were not terminated even though they disclosed SSI regarding specific flights. Mr. MacLean contends that the Board ignored the fact that other Marshals' disclosures were for personal gain, while his disclosure exposed and led to correcting an Agency mistake. He thus argues that revealing the text message to a reporter served the public interest, and that his termination undermined the efficiency of the service.

The government counters that the Board did not abuse its discretion when it determined that Mr. MacLean's termination promoted the efficiency of the service. The government argues that there is no evidence that Mr. MacLean's actions made the flying public safer. The government contends that, because even a possibility that a Marshal may be onboard is an important deterrent to terrorist activity, Mr. MacLean's disclosure compromised flight safety and forced the Agency to reallocate scarce resources to address this new vulnerability. The government explains that, although Mr. MacLean was a first-time offender with a clean record, he was properly removed because his disclosure could have had catastrophic consequences. The government argues that Mr. MacLean differs from the Marshals who kept their jobs in spite of SSI breaches because those Marshals compromised only individual flights and showed remorse.

We agree with the government. The Board analyzed the relevant *Douglas* factors and did not abuse its discretion in concluding that Mr. MacLean's removal was not a disparate penalty. *MacLean II*, 116 M.S.P.R. at 576, 580-81. Unlike other Marshals, Mr. MacLean revealed that multiple flights would be unprotected, and we cannot say that it was unreasonable for the Board to find that Mr. MacLean's belief that he was doing the right thing was outweighed by the resulting threat to public safety. Moreover, it was not unreasonable for the Board to determine that Mr. MacLean's conduct "caused the [A]gency to lose trust in him," *id.* at 579, because Mr. MacLean admitted that he has "no regrets" and "feel[s] no remorse for going

to a credible and responsible media representative," *id.* at 576. Given these circumstances, the Board did not abuse its discretion by upholding Mr. MacLean's removal.

III. Mr. MacLean's Prohibited Personnel Practice Claim

The Board rejected Mr. MacLean's argument that the Agency violated the Civil Service Reform Act by investigating him in retaliation for his FLEOA activities.[1] The statute at issue prohibits individuals in positions of authority from discriminating against a government employee "on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others." 5 U.S.C. § 2302(b)(10)(A). The Board concluded that Mr. MacLean's prohibited personnel practice challenge failed because he did not "meet his burden to establish that the reason articulated by the [A]gency was pretextual and that the real reason underlying that decision was his FLEOA activities." *MacLean II*, 116 M.S.P.R. at 575. Mr. MacLean reasserts his discrimi-

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[1] The government submitted a letter arguing that the Board lacked jurisdiction over Mr. MacLean's prohibited personnel practice claim. The government's argument is unsupported by the applicable statutes. The Board has jurisdiction to entertain prohibited personnel practice claims under 5 U.S.C. § 7701(c)(2), which states that "the agency's decision may not be sustained . . . if the employee . . . shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title." Section 7701 applies to Agency employees by virtue of 49 U.S.C. § 40122(g)(2)(H).

nation argument on appeal. He contends that the Agency investigated him because of his 2004 appearance on NBC Nightly News, which he made as part of his advocacy on behalf of FLEOA.

We agree with the government that substantial evidence supports the Board's conclusion that the Agency did not discriminate against Mr. MacLean on the basis of his FLEOA activities. Agency Policy Directive ADM 3700 "regulate[s] and prohibit[s] [Marshals'] unauthorized contact with the media," and record evidence is consistent with the AJ's determination that Mr. MacLean was initially investigated for his unauthorized media appearance, not for his FLEOA activities. J.A. 27. Indeed, it is undisputed that the Agency began to investigate Mr. MacLean "within days of his unauthorized appearance" on NBC Nightly News, which was "approximately 22 months after he began organizing and leading the [FLEOA] chapter." J.A. 55 (quotation marks omitted). Although the Agency ultimately did not pursue the media appearance charge and focused on the SSI disclosure charge, the initial investigation does not appear to be frivolous or pretextual because it was justified by Directive ADM 3700.

IV. Mr. MacLean's Affirmative Defense Under the WPA

The WPA prohibits individuals in positions of authority from taking a "personnel action" against a government employee in certain circumstances, particularly

> because of any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences . . . a substantial and specific danger to public health or safety, if such disclosure is *not specifically prohibited by law*. . . .[2]

5 U.S.C. § 2302(b)(8) (emphasis added). The Board rejected Mr. MacLean's affirmative defense that his disclosure of the text message was protected whistleblowing activity because it determined that the disclosure was "specifically prohibited by law" within the meaning of the WPA. The law that the Board relied upon is the ATSA, which states, in relevant part:

> Notwithstanding section 552 of title 5 . . . , the Secretary of Transportation *shall prescribe regulations prohibiting disclosure of information* obtained or developed in ensuring security under this title *if the Secretary of Transportation decides disclosing the information would . . . be detrimental to transportation safety*.

49 U.S.C. § 40119(b)(1) (2009) (emphases added). Because its conclusion that revealing the content of the text message was specifically prohibited by the ATSA made further WPA inquiry unnecessary, the Board did not reach the question of whether Mr. MacLean "reasonably believe[d]" that this information "evidence[d] . . . a substantial and specific danger to public

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[2] The WPA was recently amended by the Whistleblower Protection Enhancement Act (WPEA). Neither party argues that the WPEA applies to this appeal.

. . . safety." 5 U.S.C. § 2302(b)(8); *see MacLean II*, 116 M.S.P.R. at 581.

The parties do not dispute that, in order to fall under the WPA's "specifically prohibited by law" proviso, the disclosure must be prohibited by a statute rather than by a regulation. Thus, the core of the disagreement is whether the ATSA "specifically prohibit[s]" disclosure of information concerning coverage of flights by Marshals within the meaning of the WPA.

Mr. MacLean and his amici (three members of Congress) argue that the Board erroneously concluded that the ATSA's mandate to the Secretary of Transportation to "prescribe regulations prohibiting disclosure" of certain kinds of information is a specific prohibition under the WPA. They contend that the phrase "specifically prohibited by law" in the WPA can only refer to explicit statutory language that identifies specific classes of information. They argue that the ATSA's "detrimental to transportation safety" language does not establish particular criteria for withholding information and leaves a great deal of discretion to the Agency, which is inconsistent with the WPA's requirement of specificity. They contrast the ATSA with the Trade Secrets Act, which directly authorizes removal of any federal employee who divulges information that falls into particular categories. 18 U.S.C. § 1905 (2008); *see also Kent v. Gen. Servs. Admin.*, 56 M.S.P.R. 536, 540-46 (1993).

The government counters that Mr. MacLean violated a regulation promulgated pursuant to an express legislative directive in the ATSA, which made his dis-

closure "specifically prohibited" by a statute. It thus argues that Mr. MacLean's disclosure does not qualify for WPA protection. The government contends that Mr. MacLean's reading of the WPA eviscerates laws that provide for any Agency discretion in classifying information as SSI, and thus disables Congress from directing agencies to pass nondisclosure regulations. Lastly, the government argues that it does not make sense for Congress to order an agency to promulgate nondisclosure regulations and at the same time prohibit that agency from disciplining an employee for violating those regulations by providing a defense under the WPA.

We agree with Mr. MacLean that the ATSA does not "specifically prohibit" the disclosure at issue in this case. The ATSA's plain language does not expressly prohibit employee disclosures, and only empowers the Agency to prescribe regulations prohibiting disclosure of SSI "*if the Secretary decides* disclosing the information would . . . be detrimental to public safety." 49 U.S.C. § 40119(b) (emphasis added). Thus, the ultimate source of prohibition of Mr. MacLean's disclosure is not a statute but a regulation, which the parties agree cannot be "law" under the WPA.

Notably, Congress changed the language "specifically prohibited by law, rule, or regulation" in the statute's draft version to simply "specifically prohibited by law." Congress did so because it was concerned that the broader language "would encourage the adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an em-

ployee from coming forward with allegations of wrongdoing." S. Rep. No. 969, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743. Congress explained that only "a statute which requires that matters be withheld from the public as to leave no discretion on the issue, or . . . which establishes particular criteria for withholding or refers to particular types of matters to be withheld" could qualify as a sufficiently specific prohibition. *Id.* In contrast, the "detrimental to transportation safety" language of the ATSA does not describe specific matters to be withheld. It provides only general criteria for withholding information and gives some discretion to the Agency to fashion regulations for prohibiting disclosure. Thus, the ATSA does not "specifically prohibit" employee conduct within the meaning of the WPA.

The ATSA's insufficient specificity becomes even more apparent when it is contrasted with statutes that have been determined to fall under the WPA's "specifically prohibited by law" proviso. For example, the Trade Secrets Act, which the Board in *Kent* held to qualify as a specific prohibition, is extremely detailed and comprehensive. 56 M.S.P.R. at 543-46. That statute penalizes federal employees who "divulge[] . . . any information coming to [them] in the course of [their] employment . . . which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. . . . " 18 U.S.C. § 1905. The same is true of § 6013

of the Internal Revenue Code, which the Ninth Circuit in *Coons v. Secretary of the Treasury*, 383 F.3d 879, 890-91 (9th Cir. 2004), held to fall within the meaning of the WPA's "specifically prohibited" language. That statute prohibits federal employees from "disclos[ing] any return or return information obtained by him in any manner in connection with his service," 26 U.S.C. § 6013(a)(1), and then goes on to define "return" and "return information" in explicit detail, mentioning such things as "a taxpayer's identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, overassessments, or tax payments . . . ," *id.* § 6013(b)(1), (2). Thus, when Congress seeks to prohibit disclosure of specific types of information, it has the ability to draft the statute accordingly.

Nonetheless, we note that the ATSA's charge to the Secretary of Transportation to prescribe regulations pursuant to specific criteria (i.e., only information that would be detrimental to transportation safety) makes this a very close case. Indeed, the ATSA appears to fall in the middle of the spectrum of statutes flanked at opposite ends by (a) those that fall squarely under the WPA's "specifically prohibited by law" proviso, such as the Trade Secrets Act and § 6013 of the Internal Revenue Code, and (b) those in which Congress delegates legislative authority to an administrative agency without circumscribing the agency's discretion. Regulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions. In this case, given the clarity of the statutory language and legislative intent behind the WPA's specificity re-

quirement, the parameters set by Congress are not enough to push the ATSA over that threshold.

We are similarly unpersuaded by the government's argument that a parade of horribles necessarily follows our adoption of Mr. MacLean's interpretation of the WPA. The government argues that, if Mr. MacLean is allowed to pursue his whistleblower defense, the WPA would in effect prohibit later Congresses from directing agencies to pass nondisclosure regulations. The government is concerned that, under Mr. MacLean's reading, the WPA would prohibit agencies from disciplining employees for violating nondisclosure regulations and thereby prevent agencies from enforcing such regulations.

The government is mistaken. In spite of the WPA, Congress remains free to enact statutes empowering agencies to promulgate and enforce nondisclosure regulations, and it has done so in the ATSA. The government ignores the fact that the ATSA covers a wide range of conduct that would not qualify as whistleblowing. For example, no one disputes that the ATSA empowers the Agency to promulgate regulations that enable it to discipline employees who reveal SSI for personal gain or due to negligence, or who disclose information that the employee does not reasonably believe evidences a substantial and specific danger to public health or safety. The WPA also does not prohibit the Agency from following the ATSA's mandate to regulate public access to information that the Agency might otherwise be forced to disclose under the Freedom of Information Act (FOIA). Indeed, it appears

that the paramount goal of the ATSA is to empower the Agency to reject the public's requests for Agency intelligence because the statute recites that, "[n]otwithstanding [FOIA] . . . , the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title." 49 U.S.C. § 40119(b)(1); *see also Public Citizen, Inc. v. FAA*, 988 F.2d 186, 194-196 (D.C. Cir. 1993) (analyzing the predecessor statute to the ATSA and explaining that Congress's desire to enable the Agency to bar FOIA requests for information that qualifies as SSI was one of the driving forces behind the passage of that statute). Our interpretation of the WPA does not deprive the ATSA of meaning.

CONCLUSION

Because Mr. MacLean's disclosure is not "specifically prohibited by law" within the meaning of the WPA, we *vacate* the Board's decision and *remand* for a determination whether Mr. MacLean's disclosure qualifies for WPA protection. For example, it remains to be determined whether Mr. MacLean reasonably believed that the content of his disclosure evidenced a substantial and specific danger to public health or safety.

VACATED AND REMANDED

WALLACH, Circuit Judge, concurring.

Mr. MacLean presented substantial evidence that he was not motivated by personal gain but by the desire to protect the public. He averred proof that he

sought direction from his supervisors before making allegedly protected disclosures. While I join in the analysis and the result of the majority opinion, I concur to emphasize that the facts alleged, if proven, allege conduct at the core of the Whistleblower Protection Act.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2011MSPB 70

Docket No.: SF-0752-06-0611-I-2

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

July 25, 2011

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶ 1 The appellant petitions for review of the initial decision that sustained his removal. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision AS MODIFIED herein. The appellant's removal is SUSTAINED.

BACKGROUND

¶ 2 Except where specified otherwise, the following facts are not in dispute. Shortly after the terrorist attacks of September 11, 2001, the appellant was appointed to the position of Civil Aviation Security Specialist, also known as Federal Air Marshal (FAM). He was originally employed in the Department of Transportation, specifically the Federal Aviation Administration (FAA). Initial Appeal File (IAF), Tab 4, Subtabs 4S, 4U. He was transferred to the Transportation Security Administration (TSA) when that agency was created in late 2001 for the purpose of promoting aviation security, among other things. *See* Pub. L. No. 107-71, 115 Stat. 597, § 101. In early 2003 the appellant became an employee of the Department of Homeland Security (DHS) when TSA's workforce and functions were transferred to DHS. *See* Pub. L. No. 107-296, 116 Stat. 2135, 2178, § 403.

¶ 3 In July 2003, the appellant received a briefing from TSA concerning a "potential plot" to hijack U.S. airliners. Hearing Transcript (Tr.) at 80-82. Soon after the briefing, TSA officials sent a directive to FAMs that all Remain Overnight (RON) missions in early August would be cancelled.[1] At the time of the directive, the perti-

[1] The record is not entirely clear as to the precise dates that overnight missions were to be cancelled, but there is no dispute that the directive covered multiple days during the period August 1-9, 2003. Tr. at 52, 112. Pinpointing the exact dates is unnecessary to our analysis.

nent regulations prohibited disclosure of Sensitive Security Information (SSI) to the public. 67 Fed. Reg. 8340, 8351 (2002) (promulgating 49 C.F.R. §§ 1520.3 & 1520.5 as a Final Rule). Under the definition in effect at the time of the directive, SSI consisted of, among other things, "[s]pecific details of aviation security measures," including but not limited to "information concerning specific numbers of Federal Air Marshals, deployments, or missions." 67 Fed. Reg. 8340, 8352 (2002) (promulgating 49 C.F.R. § 1520.7). In July 2003, each FAM was equipped with a Personal Digital Assistant (PDA) on which he could receive encrypted messages from TSA. The appellant received the directive cancelling RONs as an unencrypted text message on his cell phone, however. Tr. at 78-82. The message was not labeled as SSI. *Id.* at 82-83.

¶ 4 The appellant believed that the suspension of overnight missions during a hijacking alert created a danger to the flying public and was inconsistent with what "the law mandated." Tr. at 84, 88. He raised his concerns with his supervisor and with an employee in the agency's Inspector General's office but was not satisfied with the responses he received. *Id.* at 84-88. The appellant then revealed the contents of the RON directive to a reporter from MSNBC, with the hope that the reporter could create a controversy resulting in rescission of the directive. Tr. at 108-110; IAF, Tab 4, Subtab 4J at 11. On Tuesday, July 29, 2003, MSNBC published an article

on its website entitled "Air Marshals Pulled from Key Flights." The article stated that "[d]espite renewed warnings about possible airline hijackings, the Transportation Security Administration has alerted federal air marshals that as of Friday they will no longer be covering cross-country or international flights, MSNBC.com has learned." IAF, Tab 4, Subtab 4J at 17. The appellant was not identified in the article. *See id.* Members of Congress criticized TSA's suspension of overnight missions, and the directive was withdrawn before it went into effect. Tr. at 92.

¶ 5 After this series of events, the appellant came to believe that FAMs should speak with "a collective voice," so he became active in the Federal Law Enforcement Officers Association (FLEOA). Tr. at 92. About a year later, the appellant appeared on NBC Nightly News, in disguise and identified as Air Marshal "Mike," when he asserted that the agency's dress code allowed would-be terrorists to identify FAMs. IAF, Tab 4, Subtab 4J at 10; Refiled Appeal File (RAF), Tab 45, Ex. TT. Someone from TSA recognized his voice, and TSA ordered an investigation into the appellant's "unauthorized media appearance." During the investigation, the appellant admitted that he was the one who told the press about the 2003 suspension of overnight missions. IAF, Tab 4, Subtab 4J at 10.

¶ 6 The agency proposed the appellant's removal on charges of: (1) Unauthorized Media Ap-

pearance; (2) Unauthorized Release of Information to the Media; and (3) Unauthorized Disclosure of Sensitive Security Information. IAF, Tab 4, Subtab 4G. The deciding official, Special Agent in Charge Frank Donzati, sustained only the third charge and imposed removal. *Id.*, Subtab 4A. Subsequently, TSA issued an August 31, 2006 order finding that the 2003 directive regarding overnight missions was SSI. IAF, Tab 22 (attachment).

¶ 7 On appeal, and following a dismissal without prejudice to allow the appellant to contest the agency's August 31, 2006 order in the United States Court of Appeals for the Ninth Circuit, IAF, Tab 29, the administrative judge certified several rulings for interlocutory review, RAF, Tab 14. In the resulting decision, the Board held as follows:

- The Board lacks the authority to determine for itself whether the particular information the appellant disclosed in 2003 was SSI. The appellant obtained a dismissal without prejudice for the purpose of instituting an action in federal court seeking a declaration that the information he disclosed was not SSI. The court found that the information he disclosed was SSI.[2] The Board and the parties are

[2] The Court also determined that the TSA order did not constitute an improper, retroactive agency adjudication, but that "the agency applied regulations that were in force in 2003 to determine

bound by the result of that litigation, regardless of the fact that the agency did not expressly deem the 2003 instruction to be SSI until after it removed the appellant.

- The appellant's disclosure of SSI to the media cannot constitute protected whistleblowing because the appellant violated agency regulations when he made the disclosure. The decision in *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993)—where the Board had held that the exception to whistleblower coverage for disclosures "specifically prohibited by law," 5 U.S.C. § 2302(b)(8)(A), applies only to disclosures prohibited by statute—was modified.

MacLean v. Department of Homeland Security, 112 M.S.P.R. 4 (2009) (*MacLean I*).

¶ 8 Upon return of the case to the regional office, the administrative judge held a hearing and issued an initial decision upholding the appellant's removal. RAF, Tab 84. The administrative judge first explained at length why he found not credible the appellant's testimony that he did not think the 2003 directive was SSI when he disclosed it to the reporter. *Id.* at 14-18. The administrative judge then sustained the charge of unauthorized disclosure of SSI. *Id.* at 18-19.

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that information created in 2003 was [SSI]." *MacLean v. Department of Homeland Security*, 543 F.3d 1145, 1152 (9th Cir. 2008).

¶ 9 The administrative judge found unproven the appellant's affirmative defense that the agency violated 5 U.S.C. § 2302(b)(10), which prohibits discrimination because of "conduct which does not adversely affect the performance of the employee or applicant or the performance of others." [3] According to the appellant, the agency targeted him because he became active in FLEOA, and his removal for unauthorized disclosure of SSI was a pretext. The administrative judge weighed the evidence and concluded that this claim was unproven. *Id.* at 20-23. Turning to the appellant's First Amendment claim, the administrative judge found that the appellant's 2003 disclosure to MSNBC addressed a matter of public concern, but that the appellant's right to speak was outweighed by the agency's need to control dissemination of information about aviation security measures. *Id.* at 23-28.

¶ 10 Finally, the administrative judge found that the penalty was reasonable. In doing so, he concluded that deciding official Donzanti properly considered the relevant factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). RAF, Tab 84 at 30. The administrative judge specifically found that, among other things, Donzanti considered that the appellant's disclosure of SSI was serious because it created a

[3] The appellant concedes that, as a FAM, he was not covered by the federal labor-relations statute at 5 U.S.C. ch. 71, and thus his activity was not protected by 5 U.S.C. § 2302(b)(9). RAF, Tab 67 at 5.

"vulnerability" as soon as the appellant made the disclosure. *Id.* at 30-31. The administrative judge further found that the offense was intentional, i.e., the appellant intentionally made a statement including the SSI to a reporter and he was on clear notice that the information should not be publicly revealed. *Id.* at 31-33. He noted the appellant's sworn statement that he had no regrets and felt no remorse for going to the media, and his sworn deposition testimony that it did not matter to him whether or not the information conveyed to the reporter was SSI. *Id.* at 31-32. The administrative judge also distinguished the comparison employees identified by the appellant purporting to evidence inconsistency of penalties. *Id.* at 35-37.

¶ 11 The appellant has filed a timely petition for review contesting all of the administrative judge's major findings and conclusions, raises affirmative defenses not raised below, and requests to submit evidence not submitted below. Petition for Review (PFR) File, Tabs 1 (original submission), 2 (supplement to PFR) & 4 (corrected PFR). The agency has responded in opposition to the PFR. *Id.*, Tab 8. The appellant has filed a reply to the agency's response. *Id.*, Tab 9. The agency moves to strike the appellant's reply, *id.*, Tab 10, and the appellant opposes the motion to strike, *id.*, Tab 11.[4] The appellant also has filed another

[4] The Board's rules do not provide for replies to responses to petitions for review. *See* 5 C.F.R § 1201.114(i); *Santella v. Special*

motion to introduce "new" evidence, which the agency has opposed. *Id.*, Tabs 12-13. The Honorable Dennis Kucinich and Honorable Carolyn Maloney, U.S. House of Representatives, have filed a motion with the Board requesting leave to file an amicus curiae brief. *Id.*, Tab 14. We grant the Representatives' motion.[5]

ANALYSIS

The administrative judge correctly sustained the charge.

¶ 12 The agency removed the appellant based on the charge of "Unauthorized Disclosure of Sensitive Security Information." In support of the charge, the agency specified as follows:

> On July 29, 2003, you disclosed Sensitive Security Information in an unauthorized manner. Specifically, you informed the media that all

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Counsel, 86 M.S.P.R. 48, ¶ 10 (2000), *aff'd on reconsideration*, 90 M.S.P.R. 172 (2001), *aff'd*, 328 F.3d 1374 (Fed. Cir. (2003). We therefore grant the agency's motion to strike the appellant's reply for this reason and because it was filed weeks after the date the record closed on review (as extended), does not purport to be based on previously-unavailable evidence, and is largely repetitive of arguments raised in the petition for review. Nonetheless, while we thus did not consider the reply in deciding this matter, we have directed the Clerk of the Board to retain the appellant's reply in the case file in order to preserve the appellate record.

[5] We accept the Representatives' amicus brief into the record, and we have considered it in deciding the appeal. Because we conclude that the arguments contained in the amicus brief do not affect the outcome of the appeal, we have not requested any response from the agency or the appellant.

> Las Vegas FAMs were sent a text message to their government issued mobile phones that all RON (Remain Overnight) missions up August 9th would be cancelled, or words to that effect. You admitted and acknowledged the foregoing during an official, administrative inquiry regarding your conduct.
>
> The media person to whom you disclosed this information is not a covered person within the meaning of the SSI regulations, 49 C.F.R. Part 1520. The information you improperly disclosed concerned RON deployments. Such information is protected as SSI pursuant to 49 C.F.R. § 1520.5(b)(8)(ii)[,] which safeguards "Information concerning the deployments, numbers and operations of . . . Federal Air Marshals . . . " The disclosure of this SSI had the potential to reveal vulnerabilities in the aviation security system, and as such, was extremely dangerous to the public we serve.

IAF, Tab 4, Subtab 4G at 2 (punctuation and capitalization in original).[6]

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[6] The regulation quoted in the charge, 49 C.F.R. § 1520.5(b)(8)(ii), is from the version in effect when the agency issued the proposal notice. *See* 69 Fed. Reg. 28066, 28083 (2004) (promulgating a revised 49 C.F.R. Part 1520 as an interim final rule with request for comments). The version in effect in July 2003 when the appellant divulged the text message to the reporter was codified under a different number but was substantively the same as the regulation quoted in the charge. *See* 67 Fed. Reg. 8340, 8352 (2002) (promulgating a final rule defining SSI at 49 C.F.R. § 1520.7(j) as including

¶ 13 The appellant argues that the administrative judge erred in sustaining the charge without making a finding whether he had a "good faith belief" that he was permitted to disclose the contents of the text message to the reporter. PFR File, Tab 4 at 18. The appellant also argues at length that the administrative judge was wrong to reject, as not credible, his testimony that he did not know the text message was SSI. *Id.* at 19-30. The agency argues that intent is not an element of the charge. PFR File, Tab 8 at 9. We agree with the agency. The charge, as titled and as described in the specification, did not contain a specific intent element; the agency did not allege in its charge that the appellant engaged in intentional misconduct. Some charges, such as falsification, by their very nature require a showing of intent. *See Naekel v. Department of Transportation,* 782 F.2d 975, 978 n.3 (Fed. Cir. 1986); *Baracker v. Department of the Interior*, 70 M.S.P.R. 594, 599 (1996). Because the agency in this case did not bring such a charge, the Board may sustain the charge without a showing of intentionality, willfulness, knowingness, or the like, as long as imposing discipline for the conduct promotes the efficiency of the service. 5 U.S.C. § 7513(a); *see Fernandez v. Department of Agri-*

"information concerning specific numbers of Federal Air Marshals, deployments, or missions"). The appellant does not contend that he was prejudiced by the agency's citation of the later version of the regulation in the charge.

culture, 95 M.S.P.R. 63 ¶¶ 6-8 (2003); *Cross v. Department of the Army*, 89 M.S.P.R. 62, ¶¶ 8-9 (2001).

¶ 14 Under the regulations in effect in July 2003, information relating to the deployment of FAMs was included within the definition of SSI. 67 Fed. Reg. 8352 (2002) (49 C.F.R. § 1520.7(j)). The appellant was not authorized to release SSI to a reporter, 67 Fed. Reg. 8351 (49 C.F.R. §§ 1520.1(a), 1520.3(a)-(b)), nor was the reporter someone with a "need to know" SSI, 67 Fed. Reg. 8352 (49 C.F.R. § 1520.5). Imposing discipline for the appellant's disclosure of the text message to a reporter promotes the efficiency of the service because maintaining confidentiality of plans for FAM deployments goes to the heart of one of TSA's missions, that of promoting civil aviation safety and security.

The appellant's disclosure to the MSNBC reporter is not protected whistleblowing because it was "specifically prohibited by law."

¶ 15 It is a prohibited personnel practice for an agency to impose discipline because of an employee's disclosure of "information . . . which the employee . . . reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law. . . . " 5 U.S.C.

§ 2302(b)(8)(A). In *MacLean I*, the Board held that the appellant's disclosure of the 2003 directive concerning overnight missions to a reporter was not protected whistleblowing because it was "specifically prohibited by law." *MacLean*, 112 M.S.P.R. 4, ¶¶ 20-33. The appellant argues that this holding was incorrect and asks that we overrule it. PFR File, Tab 4 at 60-63.

¶ 16 The law of the case doctrine refers to the practice of courts in refusing to reopen what already has been decided in an appeal, and of following a prior decision in an appeal of the same case. *Hoover v. Department of the Navy*, 57 M.S.P.R. 545, 552 (1993). These rules do not involve preclusion by final judgment, but instead regulate judicial affairs before final judgment. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 339 (1995). There are three recognized exceptions to the law of the case doctrine: The availability of new and substantially different evidence; a contrary decision of law by controlling authority that is applicable to the question at issue; or a showing that the prior decision in the same appeal was clearly erroneous and would work a manifest injustice. *Hudson v. Principi*, 260 F.3d 1357, 1363-64 (Fed. Cir. 2001); *Peartree,* 66 M.S.P.R. at 337; *Hoover*, 57 M.S.P.R. at 553. We decline the appellant's invitation to overrule the Board's 2009 decision because that decision was not "clearly erroneous," and he has not alleged any other bases for deviating from the law of the case.

¶ 17 We recognize that the Board's decision in *MacLean I* could be read broadly to allow any regulation that meets certain conditions to be accorded the full force and effect of law, and thus, a disclosure in violation of such a regulation could be construed as "prohibited by law" under 5 U.S.C. § 2302(b)(8)(A). We find that such a broad ruling is unnecessary to resolve the issues presented by this appeal and is inconsistent with the policies that Congress embodied in the Whistleblower Protection Act ("WPA"). We therefore modify *MacLean I* to the extent it is inconsistent with the decision we issue today. Rather, we find that the appellant's disclosure of SSI was "specifically prohibited by law" because the regulation that he violated when he disclosed information about FAM deployments was promulgated pursuant to an explicit Congressional mandate that required TSA to prohibit such disclosures. Specifically, in enacting Pub. L. No. 103-272, § 101, 108 Stat. 745, 1117 (July 5, 1994), codified at 49 U.S.C. § 40119,[7] Congress expressly required that TSA is-

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[7] The statute states in pertinent part as follows:

(b) DISCLOSURE. (1) Notwithstanding section 552 of title 5, the Administrator shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities under section 44501(a) or (c), 44502(a)(1) or (3), (b), or (c), 44504, 44505, 44507, 44508, 44511, 44512, 44513, 44901, 44903(a), (b), (c), or (e), 44905, 44912, 44935, 44936, or 44938(a) or (b) of this title if the Administrator decides disclosing the information would—(A) be an unwarranted invasion of personal privacy; (B) reveal a trade

sue aviation-related regulations "prohibiting disclosure of information obtained or developed in carrying out security" if, in the agency's view, "disclosing the information" would "be detrimental to the safety of passengers in air transportation." 49 U.S.C. § 40119(b)(1)(C). Citing 49 U.S.C. § 40119 (among other authorities), on February 22, 2002, the Under Secretary of TSA[8] issued regulations on February 22, 2002, which identified SSI subject to this statutory nondisclosure as including information relating to FAM deployments. 67 Fed. Reg. 8340, 8351-52 (2002).[9] Furthermore,

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secret or privileged or confidential commercial or financial information; or (C) be detrimental to the safety of passengers in air transportation.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

[8] In 2001, Congress enacted the legislation creating the Transportation Security Administration, which was charged with carrying out certain functions previously performed by the Federal Aviation Administration. *See* Pub. L. No. 107-71, 115 Stat. 597, 603 (Nov. 19, 2001). Section 101(e)(2) of that statute replaced the word "Administrator" [of the Federal Aviation Administration] in section 40119(b) with "Under Secretary," which refers to the Under Secretary of Transportation Security, *see* 49 U.S. § 1154(b)(1).

[9] The Board's 2009 decision cited 49 U.S.C. § 114(s) as the authority for the SSI regulations at 49 C.F.R. Part 1520. 112 M.S.P.R. 4, ¶ 10. However, section 114(s) (which was later redesignated as subsection (r), *see* Pub. L. No. 110-161, Div. E, § 568(a)), became law on November 25, 2002, *see* Pub. L. No. 107-296, 116 Stat. 2135, 2312, and TSA did not issue regulations under that specific statutory authority until May 18, 2004, *see* 69 Fed. Reg. 28066, 28082

the Ninth Circuit Court of Appeals has unequivocally declared that the information disclosed by the appellant constituted SSI as defined in those regulations. *See MacLean*, 543 F.3d at 1150.[10] Consequently, because the appellant disclosed information that is specifically prohibited from disclosure by a regulation promulgated pursuant to an express legislative directive from Congress to TSA,[11] we find that his disclosure was "specifi-

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(2004). Nevertheless, as explained above, 49 U.S.C. § 40119 (which is substantively similar to section 114(s)) gave the Under Secretary for Transportation Security the authority to issue regulations prohibiting the disclosure of information if such disclosure would be "detrimental to the safety of passengers in air transportation," the Under Secretary issued such regulations in 2002, *see* 67 Fed. Reg. 8340, 8351-52, and the appellant violated those regulations. The citation to 49 U.S.C. § 114(s) instead of section 40119 in the Board's 2009 decision had no affect on the outcome.

[10] Congress established judicial review of TSA final orders in the federal courts of appeals with exclusive review by the Supreme Court. *See* 49 U.S.C. §§ 46110(a) and (e) ("A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.") Thus, this Board has no authority to review the decision of the Ninth Circuit holding that the information that the appellant disclosed constituted SSI because it "contained 'specific details of aviation security measures' regarding 'deployment and missions' of [FAMs]" in violation of 49 C.F.R. § 1520.7(i). *MacLean*, 543 F.3d at 1150.

[11] The Board has no authority to review either the statutory mandate against disclosure, or the legality of the regulation issued pursuant thereto. *See Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985) (the Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation); 5 U.S.C. § 1204(f).

cally prohibited by law" so as to bring it outside the scope of the whistleblower protection provisions of 5 U.S.C. § 2302(b)(8).

¶ 18 We would share some of the concerns expressed by Representatives Kucinich and Maloney if *MacLean I* were given the broad sweep that they address in their amicus brief. As we have explained above, however, we limit our holding here and the reach of *MacLean I* in order to give effect to both the WPA and Congress's express intent to prohibit the public disclosure of aviation security information. The appellant's disclosure of FAM deployment information was not protected by the WPA because it was prohibited by SSI regulations issued by TSA in compliance with an express statutory requirement of Congress to issue regulations "prohibiting disclosure of information obtained or developed in carrying out security" if, in TSA's view, "disclosing the information" would "be detrimental to the safety of passengers in air transportation." 49 U.S.C. § 40119(b)(1)(C). To the extent that this statutory mandate encroaches upon the protections afforded by the WPA, it is for Congress, not the Board, to resolve the competing legislative objectives underlying these statutes.

¶ 19 Although the appellant's disclosure of information relating to FAM deployments to an MSNBC reporter does not constitute protected whistleblowing activity, our holding today does not mean that TSA may rely on its SSI regula-

tions as authority for prohibiting *all* disclosures relating to aviation security and safety. On the contrary, Congress has specified that the regulations issued pursuant to its mandate in 49 U.S.C. § 40119 may not prohibit disclosures to "a committee of Congress authorized to have the information." 49 U.S.C. § 40119(b); *see also* 49 U.S.C. § 114(r)(2). Additionally, we note that the "specifically prohibited by law" exclusion from WPA protection does not apply to disclosures made to the Office of Special Counsel. 5 U.S.C. § 2302(b)(8)(B); *see Parikh v. Department of Veterans Affairs*, 110 M.S.P.R. 295. ¶ 23 n.1 (2008). The appellant did not pursue either of these channels.[12]

¶ 20 Finally, the case of *Chambers v. Department of the Interior*, 602 F.3d 1370 (Fed. Cir. 2010), while appearing to have some similarity to this case, is distinguishable. Ms. Chambers, like the appellant herein, publicly disclosed information about the deployment of law enforcement officers. *Id.* at 1378. Ms. Chambers's disclosure of a substantial and specific danger to public health or safety, *id.* at 1379, was protected under 5 U.S.C. § 2302(b)(8)(A)(ii), however, because it was not

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[12] Because the appellant did not make his disclosure through either of the two authorized channels described above, we make no finding on whether, if he had, his disclosure would have been protected as evidencing a violation of law, rule, or regulation, a substantial and specific danger to public health or safety, or some other condition described at 5 U.S.C. § 2302(b)(8).

"specifically prohibited by law." By contrast, while the appellant was also arguably disclosing a substantial and specific danger to public health or safety, his disclosure cannot similarly be protected under 5 U.S.C. § 2302(b)(8)(A)(ii) because it contained SSI, the disclosure of which was "specifically prohibited by law" under a regulatory nondisclosure scheme mandated by Congress.

The appellant's removal based on his 2003 SSI disclosure did not violate his First Amendment right of free speech.

¶ 21 The appellant contends that the agency violated his First Amendment right to freedom of speech by removing him for his 2003 disclosure of SSI to the MSNBC reporter.[13] The administrative judge found the appellant's First Amendment claim unproven, finding that under the balancing test outlined in *Pickering v. Board of Education of Township High School District 205, Will Count, Illinois*, 391 U.S. 563, 568 (1968), the ap-

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[13] In the summary of the prehearing conference, the administrative judge did not list as an affirmative defense a claim by the appellant that that his disclosure to MSNBC in 2003 about the suspension of overnight missions was protected under the First Amendment. RAF, Tab 67. The appellant made that argument in his post-hearing brief, however, RAF, Tab 79 at 16-18, the administrative judge addressed it in the initial decision, RAF, Tab 84 at 23-28, and the agency does not argue on review that the issue should not have been considered, PFR File, Tab 8 at 19-20. Under the circumstances, we deem the appellant's claim that his 2003 disclosure to MSNBC was protected free speech under the First Amendment to be properly before us.

pellant's interest in commenting on a matter of public concern, *i.e.*, the 2003 directive regarding overnight missions, was outweighed by the interest of the agency, as employer, in promoting aviation security. The appellant challenges this finding. PFR File, Tab 4 at 56-57. We note, in this regard, courts have recognized that law enforcement duties entail special obligations with regard to public trust that may be considered in the *Pickering* balancing. *See, e.g., United States v. Aguilar*, 515 U.S. 593, 606 (1995); *O'Donnell v. Barry*, 148 F.3d 1126, 1135 (D.C. Cir. 1998); *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1201 (9th Cir. 2000); *Bennett v. City of Holyoke*, 230 F. Supp. 2d 207, 225 (D. Mass. 2002), *aff'd*, 362 F.3d 1 (1st Cir. 2004); *Pierson v. Gondles*, 693 F. Supp. 408, 418 (E.D. Va. 1988).

¶ 22 Here, the record reflects that the appellant revealed information about FAM deployments that the agency legitimately expected to remain confidential, and which created a vulnerability in the aviation system. We find that disciplining the appellant for releasing details of aviation security measures to a reporter did not violate his First Amendment right of free speech. *Cf. Chambers v. Department of the Interior*, 103 M.S.P.R. 375, ¶¶ 36-42 (2006) (disciplining a Chief of Police for disclosing information about officer patrols and her agency's budget to a reporter did not violate her First Amendment right of free speech), *aff'd in part, vacated in part on other*

grounds, and remanded, 515 F.3d 1362 (Fed. Cir. 2008).

¶ 23 We also believe the fact that the agency acted in this instance pursuant to, and consistent with, the aforementioned statutory and regulatory nondisclosure scheme mandated by Congress regarding aviation security, undercuts the appellant's constitutional claim. To the extent that the appellant's claim implicitly involves a challenge to the constitutionality of the statute authorizing the agency to issue the nondisclosure regulations, the Board lacks jurisdiction to hear such a claim. *See May v. Office of Personnel Management*, 38 M.S.P.R. 534, 538 (1988) (the Board has authority to adjudicate a constitutional challenge to an agency's application of a statute, but it is without authority to determine the constitutionality of federal statutes).

The appellant did not prove his prohibited personnel practice claim under 5 U.S.C. § 2302(b)(10).

¶ 24 As discussed above, the appellant also contends that the agency retaliated against him because of his FLEOA activities, thereby committing a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(10). The relevant statute pertinently provides:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

. . . .

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; . . . .

5 U.S.C. § 2302(b)(10).

¶ 25 The Board has not previously established the precise elements for proving a violation of 5 U.S.C. § 2302(b)(10). Depending on the specific facts and circumstances, the proscription of § 2302(b)(10) may be analogous to either (1) the prohibition against retaliation for exercising appeal rights, filing grievances, etc., found at 5 U.S.C. § 2302(b)(9), or to (2) a traditional claim of discrimination governed by the principles of Title VII. We find it unnecessary in this case, however, to decide the specific legal framework that the Board will apply to future § 2302(b)(10) claims because the appellant has failed to prove his claim under either standard.

¶ 26 To establish a prima facie violation of 5 U.S.C. § 2302(b)(10) applying the (b)(9) framework, the appellant must demonstrate that: (1) He engaged in activity that did not adversely affect his performance; (2) he was subsequently treated in an adverse fashion by the agency; (3) the deciding official had actual or constructive knowledge of the appellant's (b)(10) activity; and (4) there is a causal connection between the (b)(10) activity and

the adverse action. *See Crump v. Department of Veterans Affairs*, 114 M.S.P.R. 224, ¶ 10 (2010); *Wildeman v. Department of the Air Force*, 23 M.S.P.R. 313, 320 (1984); *see also Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986). Where, as here, the agency has already articulated a non-retaliatory reason for its action, i.e., the charged misconduct, it has done everything that would be required of it if the appellant had made a prima facie case. Thus, our inquiry proceeds directly to the ultimate question of whether, weighing all the evidence, the appellant has met his burden of proving illegal retaliation. *Crump*, 114 M.S.P.R. 224, ¶ 10; *see U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

¶ 27 If analyzed under the legal framework for traditional Title VII claims, in order to prevail the appellant had to show by preponderant evidence that he engaged in conduct that did not adversely affect his performance and that the agency intentionally discriminated against him for that conduct. In the absence of direct evidence of intentional discrimination, the appellant could meet this burden by introducing evidence giving rise to an inference of disparate treatment because of his conduct unrelated to his performance. *Davis v. Department of the Interior*, 114 M.S.P.R. 527, ¶ 7 (2010), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Assuming that he did so, the burden of production shifts to the agency to articulate a legitimate, nondiscrimina-

tory reason for its action. *Id.*, ¶ 8. If the agency meets this burden, the appellant then must prove that the agency's stated reason is merely a pretext for discrimination prohibited by (b)(10) and the activity unrelated to his performance was the real reason for the disparate treatment. *Id.* In most adverse action appeals taken pursuant to 5 U.S.C. chapter 75, the agency has already articulated a nondiscriminatory reason for its action, *i.e.*, the charged misconduct; accordingly, the agency has done everything that would be required of it if an appellant had made out a prima facie case, and whether he in fact did so is no longer relevant. *See id.*, ¶ 9 n.3, *citing Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 6 (2008). As a result, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met his overall burden of proving illegal discrimination. *See id.*

¶ 28 Because either framework requires us to proceed to the ultimate question of whether the agency intentionally retaliated or discriminated against the appellant for his (b)(10) activities,[14] we have reviewed the record and we conclude that the appellant has failed to meet his burden to establish that the reason articulated by the agency for its decision to remove him was pretextual and that

[14] We assume, without deciding, that the agency would commit a prohibited personnel practice in violation of § 2302(b)(10) if it removed the appellant in retaliation for his FLEOA activities.

the real reason underlying that decision was his FLEOA activities. Even if we were to accept appellant's contentions that agency managers disapproved of his FLEOA activities, *see, e.g.*, RAF, Tab 45 at 5-8, 19-27, there is no direct evidence that the agency retaliated or discriminated against him for engaging in FLEOA activities when it removed him from employment.

¶ 29 There is no question that the appellant disclosed SSI in violation of agency regulations prohibiting such disclosure and that this was the agency's stated basis for his removal. The appellant contends, though, that he was treated more harshly than other similarly situated individuals who disclosed SSI and also that he and other FLEOA leaders were singled out for retaliatory treatment. RAF, Tab 45 at 6-8. While the record reflects that the agency treated other employees less harshly for their disclosures of SSI, the circumstances surrounding those disclosures are sufficiently distinct from the instant case as to undercut any inference that the reason for the difference is discrimination based on the appellant's FLEOA activities. For instance, the disclosures attributed to J.S. or J.M. were limited to a small number of individuals (to a few passengers on a plane under exigent circumstances and to some airline personnel for personal reasons, respectively). As for A.R., we note that, in the single specification of the unauthorized disclosure of SSI charge, the agency alleged that A.R. "posted a message on www.delphiforums.com that

revealed security measures concerning the deployment of FAMS on international flights from the Atlanta Field Office." RAF, Tab 45, Exhibit F. Unlike the appellant's disclosure, which created a vulnerability in aviation security by revealing to a national news reporter that FAMs were no longer going to be present on *any* RON missions, A.R.'s disclosure appears to have been more limited because: it was disclosed on a single message board; it only identified FAM deployments out of the Atlanta Field Office; and it appeared to leave open the possibility that other offices would be responsible for those flights.

¶ 30 Further, the appellant's reliance on another individual, Frank Terreri, as similarly situated appears misplaced as the comparison actually undermines his claim that his FLEOA activities resulted in a harsher penalty. Mr. Terreri was the president of the air marshal chapter of FLEOA, engaged in outspoken criticism of agency management and its policies, and was investigated for releasing SSI. But he continues to be employed by TSA after the allegations made against him were deemed to be unfounded. Tr. at 60, 116-17.

¶ 31 Significantly, the administrative judge correctly found that the appellant demonstrated a lack of regret for disclosing the RON information, reflected, for example, in his deposition testimony to the effect that it did not matter to him if the information was confidential, law enforcement

> sensitive, SSI or classified information. RAF, Tab 44, Exhibit 8; Tr. at 113-15, 118-23. The appellant also admitted during the Immigration and Customs Enforcement (ICE) Office of Professional Responsibility (OPR) investigation:
>
> Due to the fact that my chain of command, the DHS OIG and my Congressmen all ignored my complaints and would not follow them up with investigations, I have NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative, Brock Meeks. Brock Meeks reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies.

IAF, Tab 4, Subtab 4J, Exhibit 2 (emphasis in original).

¶ 32 In the face of a clear Congressional directive for nondisclosure and a regulatory provision promulgated pursuant to that directive, which explicitly prohibits the type of public disclosure made by the appellant, the agency could and did reasonably infer a risk from the appellant's lack of remorse that he would continue to make disclosures that were prohibited by law. Thus, under the circumstances, we find that the appellant's lack of remorse to be a significant distinction justifying the agency's decision to remove him rather than imposing a lesser penalty. *Cf.* RAF, Tab 45, Exhibit F (the deciding official in A.R.'s case stated that he "plac[ed] a great deal of weight" on the fact that A.R. "demonstrated sincere remorse over this current incident" and "as-

sured" the deciding official that he would "demonstrate the utmost diligence when handling SSI information.").

¶ 33 Considering the record as a whole, we find that the appellant has not proven by a preponderance of the evidence that the agency intentionally discriminated or retaliated against him on the basis of his FLEOA activities in violation of 5 U.S.C. § 2302(b)(10).[15]

The Board will not consider the appellant's claim raised for the first time on petition for review that the agency initiated its investigation in retaliation for his engaging in protected whistleblowing and First Amendment speech.

¶ 34 For the first time on petition for review, the appellant argues that his 2004 appearance on NBC Nightly News was protected free speech under the First Amendment and protected whistleblowing under 5 U.S.C. § 2302(b)(8), and that the agency's investigation in response to his appearance was unlawful retaliation in violation of the First Amendment and the WPA. PFR File, Tab 4 at 53-60.

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[15] To the extent the appellant contends that the agency violated his First Amendment rights based on his involvement with FLEOA, we find, for all of the reasons explained by the administrative judge and in our discussion of the appellant's § 2302(b)(10) claim, that the agency took its actions based on the charged misconduct and not for his association with or activities on behalf of the FLEOA.

¶ 35 In the summary of the prehearing conference, the administrative judge stated as follows with respect to the appellant's affirmative defenses:

> Here, the appellant alleges that the agency discriminated and retaliated against him based on his membership and leadership status with the FLEOA for other than merit reasons in violation of 5 U.S.C. § 2302(b)(10); and that this discrimination and retaliation violated his First Amendment right of free association and his right to free speech. No other affirmative defenses are alleged in this appeal.

RAF, Tab 67 at 6. The administrative judge advised the parties that additional issues were precluded absent a timely meritorious objection. *Id.* at 5-6. The appellant did not make any objection, and the issues he now attempts to raise were not mentioned in the summary of the prehearing conference. The general rule under such circumstances is that the issues raised for the first time on review will not be considered. *See Henson v. U.S. Postal Service,* 110 M.S.P.R. 624, ¶ 10 (2009); *Wilson v. Department of Justice*, 58 M.S.P.R. 96, 101 n.4 (1993).

¶ 36 The appellant argues that we should make an exception to this general rule. He cites Board and federal appeals decisions for the principle that a new claim may be raised on review when the administrative judge confused or misled a party with respect to the claim, or when the party raising the claim has newly-discovered evidence. PFR File, Tab 4 at 58-60. While we do not

quarrel with the appellant's reading of the cases, the appellant makes no attempt to explain how the decisions he cites apply here. He does not allege, nor is there any evidence, that the administrative judge confused or misled him with respect to his claim regarding his 2004 appearance on NBC Nightly News. Rather, the appellant contends that by rejecting his FLEOA defense, in part, on the grounds of the appellant's own testimony that the 2004 television appearance was the catalyst for the agency's investigation, the administrative judge somehow "converted [his FLEOA defense] to a dispositive First Amendment violation" and "created a violation of the [WPA]." *Id.* at 54, 57-58. Even assuming the administrative judge found that the appellant's television appearance was the impetus for the investigation, we disagree with the appellant that this conclusion somehow "created" new claims that were not previously known to him.

¶ 37 Indeed, the appellant does not allege that he only discovered that his appearance on NBC Nightly News spurred the investigation after the record closed below. In fact, the appellant testified before the administrative judge that his 2004 appearance on NBC Nightly News is what caused the agency to initiate the investigation in which he admitted revealing the 2003 RON directive to MSNBC. Tr. at 93. In other words, the appellant knew before the record closed below what caused the agency to begin its investigation. Thus, this is not a case in which a party attempts

to raise a new claim on review based on evidence discovered after the record closed below. For these reasons, we will not consider the issues the appellant raises for the first time in his petition for review.

The Board also will not consider the new evidence submitted by the appellant on petition for review.

¶ 38 The Board does not accept the evidence that the appellant attempts to submit for the first time on review. The appellant requests to supplement the record with a transcript of a statement he gave to agency investigators on May 4, 2005. According to the appellant, the transcript undercuts the administrative judge's credibility determination on the question of whether the appellant was revealing SSI when he shared the July 2003 RON directive with MSNBC. *See* RAF, Tab 84 at 14-18; PFR File, Tab 1 at 73-89; *id.*, Tab 4 at 14. We deny the appellant's request to supplement the record for two reasons. First, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The appellant's own submission shows that he was provided with the transcript more than 3 years before the hearing. PFR File, Tab 1 at 71. Second, as we discuss in our analysis of the charge and penalty, the outcome of this case does not turn on whether the appellant credibly testi-

fied that he did not know the RON directive was SSI when he disclosed it to the MSNBC reporter. Thus, the transcript is immaterial to the outcome in the appeal.

The penalty of removal is within the bounds of reasonableness.

¶ 39 We affirm the administrative judge's thorough analysis of the penalty and we need not repeat all of it here. RAF, Tab 84 at 28-40. Some factors warrant further discussion, however. When the Board sustains all the charges, it reviews the agency's choice of penalty only to determine whether the agency considered all of the relevant factors and exercised management discretion within the parameters of reasonableness. *Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 11 (2010). The Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Id.*; *see also Douglas*, 5 M.S.P.R. at 305-06. Here, as the administrative judge found, there is ample evidence that the agency considered all of the relevant factors. Tr. at 12-22; RAF, Tab 84 at 30.

¶ 40 The most important factor in an agency's penalty determination is the nature and seriousness of the misconduct and its relation to the appellant's duties, including whether the offense was intentional. *Jinks v. Department of Veterans Affairs*, 106 M.S.P.R. 627, ¶ 17 (2007). The appellant revealed information about FAM deployments in violation of regulations requiring that it

remain confidential. His actions caused the agency to lose trust in him, and divulging security measures to the media created an immediate vulnerability in the aviation system. Tr. at 15, 21-22. The appellant's revelation of confidential information to a reporter was intentional, by his own admission. Tr. at 108-110. Also significant to rehabilitative potential and the agency's penalty determination is that the appellant lacked remorse for disclosing the RON information, as reflected in his deposition. RAF, Tab 44, Exhibit 8; Tr. at 113-15, 118-23. The agency could and did reasonably infer a risk from the appellant's lack of remorse that he would continue to make disclosures that were specifically prohibited by law.

¶ 41 After thoughtfully considering the entire record, we also are not persuaded that the appellant believed in "good faith" that he was permitted to share plans for the deployment of FAMs with the MSNBC reporter. PFR File, Tab 4 at 29-30. At the time of his appointment in 2001, the appellant was presented with a single-page form captioned "Conditions of Employment for Federal Air Marshals." The appellant signed the form at the bottom, and initialed the form next to the following words: "I accept the position of Federal Air Marshal. I have read and I accept the Conditions of Employment." One of those conditions was that a FAM "may be removed" for "[u]nauthorized release of security-sensitive or classified information." IAF, Tab 4, Subtab 4T.

Apart from this written acknowledgment of the seriousness of unauthorized disclosure of SSI in general, the appellant testified that in his training it was made "very, very clear" that FAMs should not tell anyone, not even their spouses, which flights they would be on because the information could be repeated to "the wrong people." Tr. at 106-07. The appellant further testified that telling someone a flight would not have a FAM on it would endanger the flight. *Id.* at 108. Based on the foregoing, we find that the appellant knew that he was not permitted to share information about FAM coverage with a reporter, regardless of the fact that he received the information as a text message on his cell phone instead of on his encrypted PDA, and even if he was unsure of its SSI classification.

¶ 42 It makes no difference to our penalty analysis whether the appellant knew that the message suspending overnight missions fell within the regulatory definition of SSI. As explained immediately above, the appellant admittedly knew that he was not permitted to tell anyone about FAM scheduling, yet he did so anyway, and it could have created a significant security risk. As a law enforcement officer, the appellant can be held to a high standard of conduct. *Mahan v. Department of the Treasury*, 89 M.S.P.R. 140, ¶ 11 (2001); *Crawford v. Department of Justice*, 45 M.S.P.R. 234, 237 (1990). The appellant's actions in July 2003 did not exhibit the good judgment that the agency can legitimately expect of its law

enforcement personnel. *Mahan*, 89 M.S.P.R. 140, ¶ 11.

¶ 43 The appellant contends that he was treated more harshly than other similarly situated individuals who disclosed SSI and also that he and other FLEOA leaders were singled out for retaliatory treatment. RAF, Tab 45 at 6-8. As we explained when addressing the appellant's claim under 5 U.S.C. § 2302(b)(10), although the record reflects that the agency treated other employees less harshly for their disclosures of SSI, the circumstances surrounding those disclosures are plainly distinguishable and do no suggest that the agency subjected him to a disparate penalty.

¶ 44 We also accept, without finding, that the appellant believed he did the right thing in disclosing the information. We have specifically considered the appellant's testimony regarding his belief that TSA's plan to eliminate FAMs from overnight flights was "serious" and "dangerous to the . . . public," and that his disclosure was motivated by his desire to protect the flying public. Tr. at 88, 90; *see id.* at 122 ("All I wanted to do was protect lives and . . . uphold the law."). The appellant also testified: "If I saved—if I saved a plane from falling out of the sky or saved a life, I believe I did my job, and I shouldn't regret it." Tr. at 115. Further, as the administrative judge concluded, we also have no reason to doubt that the appellant's motivation was sincere. RAF, Tab 84 at 28 (the administrative judge, when

discussing the appellant's First Amendment claim, stated that he had "no reason to doubt the appellant's assertion that he took these actions to benefit the nation. . . ."). However, even if the appellant could have established the classic elements of whistleblowing, i.e., that he disclosed a substantial and specific danger to public safety and that his disclosure was a contributing factor in his removal,[16] he cannot invoke WPA protection because his disclosure was specifically prohibited by law.

¶ 45 For all of the above reasons as well as those explained by the administrative judge, we find that the agency's removal penalty did not exceed the bounds of reasonableness. The appellant's removal is SUSTAINED.

ORDER

¶ 46 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this

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[16] As we noted earlier, we do not determine whether the appellant's disclosure would be protected under the WPA because he did not make it through authorized channels. *Infra*, n.12.

final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

Docket No.: SF-0752-06-0611-I-2

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

INITIAL DECISION

Date: May 12, 2010

Before: FRANKLIN M. KANG, Administrative Judge

INTRODUCTION

The appellant timely appealed the Transportation Security Administration's (TSA) decision to remove him from the position of Federal Air Marshal (FAM), with duties in Los Angeles, California, effective April 11, 2006. Initial Appeal File 1 (IAF-1), Tab 1, 4. On October 5, 2006, an administrative judge dismissed this appeal without prejudice at the request of the appellant. IAF, Tab 29. This initial decision (ID) became final on November 9, 2006 when the parties declined to file a petition for review. *See id.*

On October 15, 2008, the appellant timely refiled this appeal. Initial Appeal File 2 (IAF-2), Tab 1. The Board assigned this refiled appeal to a second administrative judge. IAF-2. On June 22, 2009, the Board issued an Opinion and Order addressing matters certified for interlocutory appeal. IAF-2, Tab 27. On July 13, 2009, the second administrative judge informed the parties that the Board had ruled on the issues certified for interlocutory appeal and advised the parties that the adjudication would resume. IAF-2, Tab 29. Thereafter, this appeal was reassigned to a third administrative judge. IAF-2, Tab 31.

A hearing was held on November 5, 2009 as specified below. Hearing Compact Disc (HCD). The appellant traveled from California to Virginia to appear with his attorneys from the Board's Washington Regional Office by video-conference (VTC), while the agency appeared from the Board's Western Regional Office in California as well as the Washington Regional Office. *Id.* The Board has jurisdiction under 5 U.S.C. §§ 7511-7513 and 7701. For the reasons explained below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Burden of Proof and Applicable Law

The agency bears the burden of proof by preponderant evidence with respect to the reasons for the action and its choice of penalty. 5 C.F.R. § 1201.56(a). Preponderant evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to

find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c).

Background

At the time of his removal, the appellant, born in 1970 with a service computation date in 1992, was a preference eligible FAM, SV-1801-9, assigned to Los Angeles, California. IAF-1, Tab 4, Subtab 4F; IAF-2, Tab 45; Exhibit S. It is undisputed that the appellant was an employee pursuant to 5 U.S.C. § 7511(a)(1) at the time of his removal.

According to a Report of Investigation (ROI) in the record evidence, based on a September 2004 report of an unauthorized media appearance by the appellant, the agency initiated an investigation. IAF-1, Tab 4, Subtab 4J. On May 4, 2005, during an investigative interview conducted by the agency's Immigration and Customs Enforcement (ICE) Office of Professional Responsibility (OPR), the appellant submitted a signed and sworn affidavit stating in relevant part:

> For the July 29, 2003 article, I informed [the reporter] that all Las Vegas FAMs were sent a text message to their Government issued mobile phones that all RON (Remain Overnight) missions up to August 9 would be canceled. My supervisor told me that the Service ran out of funds for overtime, per diem, mileage and lodging.
>
> . . . .
>
> Due to the fact that my chain of command, the DHS OIG and my Congressmen all ignored my complaints and would not follow them up with investi-

> gations, I have NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative, [the reporter]. [The reporter] reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies.

IAF-1, Tab 4, Subtab 4J (appellant's affidavit) (upper case lettering in original). Following this interview, the agency's investigators concluded, *inter alia,* that the appellant made an unauthorized release of information to the media. *Id.,* Subtab 4J.

On September 13, 2005, the appellant received a Proposal to Remove (proposal or proposed removal), charging the appellant with Unauthorized Media Appearance, Unauthorized Release of Information to the Media, and Unauthorized Disclosure of Sensitive Security Information (SSI). IAF-l, Tab 4, Subtab 4G. On April 10, 2006, Special Agent in Charge (SAC) Frank Donzanti issued a decision on the proposed removal, sustaining only the third charge and the proposed penalty. *Id.,* Subtab 4A.

The third charge, Unauthorized Disclosure of SSI, is accompanied by a single specification. IAF-2, Tab 67 at 5-6. The underlying specification contains background information and alleges that on July 29, 2003, the appellant informed the media that all Las Vegas FAMs were sent a text message on their government issued mobile phones that all remain overnight (RON) missions up to August 9th would be cancelled; or words to that effect, and that this constituted an improper disclosure of SSI because the media person to whom

this information was disclosed was not a covered person within the meaning of SSI regulations, and the information about RON deployments was protected as SSI. *Id.* On May 10, 2006, the appellant timely filed his petition for appeal. IAF-1, Tab 1.

On August 31, 2006, the agency's SSI Office Director issued a final order (AFO) on SSI related to this appeal, stating in part:

> [I]t is my determination that, on July 29, 2003, the information in question constituted SSI under the SSI regulation then in effect, 49 C.F.R. § 1520.7(j),[] as the information concerned specific FAM deployments or missions on long-distance flights.
>
> . . . .
>
> Pursuant to 49 U.S.C. § 46110, any person disclosing a substantial interest in this Order may, within 60 days of its issuance, apply for review by filing a petition for review in an appropriate U.S. Court of Appeals.

IAF-1, Tab 22, Attachment. The AFO explained through a footnote that on May 18, 2004, the agency recodified section 1520.7(j) at section 1520.5(8)(ii). *Id.*

The text of 49 C.F.R. § 1520.7(j)[1] in effect at that time, current through October 1, 2003 defined SSI as follows:

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[1] Under 49 C.F.R. § 1520.5(b)(8)(ii), information concerning deployments, numbers, and operations of FAMs is considered SSI.

> Specific details of aviation security measures whether applied directly by the TSA or entities subject to the rules listed in § 1520(a)(1) through 6. This includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.

See IAF-1, Tab 4, Subtab 4M.

In granting the appellant's request for a dismissal without prejudice, the ID stated:

> After the action was taken and the appellant filed his appeal, the agency issued a "Final Order" dated August 31, 2006, determining that the appellant's disclosure is covered under the regulation at issue. A right of review is provided in the U.S. Court of Appeals pursuant to 49 U.S.C. § 46110.

IAF-1, Tab 29. The ID explained that the appellant intended to pursue such a review, and the appellant's appeal was dismissed without prejudice to refiling. *Id.* The ID thereafter became the final decision of the Board. *See id.*

On September 16, 2008, the U.S. Court of Appeals for the Ninth Circuit ruled on the appellant's petition for review of the AFO. *MacLean v. Department of Homeland Security,* 543 F.3d 1145 (9th Cir. 2008). In denying the appellant's petition through this *per curiam* opinion, the 9th Circuit wrote, in part:

> In late July, 2003, while working as a Federal Air Marshal in Nevada, MacLean received a text message on his government-issued cell phone stating

that "all RON (Remain Overnight) missions . . . up to August 9th would be cancelled." This message indicated to MacLean that there would be no Federal Air Marshals on overnight flights from the time of the text message up to August 9, 2003. MacLean believed that the cancellation of these missions was detrimental to public safety. He raised this concern with his supervisor,[] who did not make further inquiry. MacLean then attempted unsuccessfully to alert the Office of Inspector General. On July 29, 2003, MacLean disclosed the text message to members of the press. The Federal Air Marshal Service later confirmed that the text message's contents did not reflect a final decision of its director and there was no cancellation of overnight missions.

. . . .

Pursuant to 49 U.S.C. § 46110(c), we have jurisdiction to review only final agency "orders". . . . . We have jurisdiction to review the TSA-order.

. . . .

Section 1520.7(j) (2003) designates as "sensitive security information . . . [s]pecific details of aviation security measures . . . applied directly by the TSA . . . [which] includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." Information falling within this designation is *automatically considered* "sensitive security information" without further action from the TSA, 49 C.F.R. § 1520.7 (2003). The TSA has authority to

designate information as "sensitive security information" pursuant to 49 U.S.C. § 114(s) and 49 C.F.R. § 1520.

[] The information contained in the text message qualifies as "sensitive security information." The message contained "specific details of aviation security measures" regarding "deployment and missions" of Federal Air Marshals. 49 C.F.R. § 1520.7(j) (2003).

. . . .

MacLean has failed to demonstrate what more the TSA needed to show to support the order. The order is valid

. . . .

The Whistleblower Protection Act does not apply to the order. The order is not a "personnel action," as required by the Act.[] It is merely a determination that [] the text message contained "sensitive security information" pursuant to 49 C.F.R. § 1520.7(j). The fact that the order has some impact on MacLean's proceedings before the MSPB does not convert it to a "personnel action."

. . . .

The TSA order does not constitute a retroactive agency adjudication. Rather, the agency applied regulations that were in force in 2003 to determine that information created in 2003 was "sensitive security information." . . . The TSA order comports with the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place."

Id. (italics added). On October 15, 2008, the appellant timely refiled this appeal, and the Board assigned this appeal the second administrative judge. IAF-2, Tabs 1, 2. It is undisputed that at the time of the events at issue, inclusive of the specification before the Board, the appellant was assigned to the FAM service center in Las Vegas, Nevada. *See* IAF-2, Tab 45, Exhibit X; IAF-2, Tab 49, Exhibit PPP.

On February 10, 2009, the second administrative judge granted a motion to certify specific rulings for interlocutory appeal as follows. IAF-2, Tab 23. The issues were: (1) whether the Board has the authority to review the determination by the agency, and affirmed by the Ninth Circuit, that the information the appellant disclosed constituted SSI; (2) whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him has any effect on the issue in (1), above; and (3) whether a disclosure of information that is SSI can also be a disclosure protected by the Whistleblower Protection Act (WPA).

On June 22, 2009, the Board issued its Opinion and Order, ruling on the above enumerated items as follows. *MacLean v. Department of Homeland Security,* 112 M.S.P.R. 4 (2009). In addressing question (1), the Board held that under the facts of this appeal, the Board does not have the authority to review the agency's SSI determination because the Ninth Circuit has issued a decision upholding the agency's determination. *Id.* at 11. For question (2), the Board explained that the timing of the AFO did not alter its

conclusion on question (1) because Congress provided individuals a judicial mechanism to challenge the SSI determination through the U.S. Court of Appeals, and the appellant actually availed himself of that opportunity. *Id.* at 12. The Board continued, explaining that the grant of exclusive jurisdiction in Federal court was triggered in this particular case, therefore, the Board lacks authority to review the agency's determination on this matter. *Id.* On question (3), the Board found that a disclosure in violation of the regulations governing SSI is prohibited by law within the meaning of 5 U.S.C. § 2302(b)(8)(A) and cannot give rise to whistleblower protection. *Id.* at 18.

On July 13, 2009, the second administrative judge scheduled a status conference to address the adjudication schedule for this matter IAF-2, Tab 29. On July 22, 2009, prior to this status conference, this case was reassigned to a third administrative judge. IAF-2, Tab 31.

On September 22, 2009, the parties appeared for a prehearing conference. IAF-2, Tab 59; *see* IAF-2, Tabs 73, 75. At the request of the appellant, the hearing and the remainder of the prehearing conference were delayed. *Id.* The hearing was thereafter further delayed at the request of the agency, then convened on November 5, 2009 as described above. IAF-2; Tabs 62, 75; HCD. On November 16, 2009, the parties filed their closing arguments and the record was closed for all matters. HCD; IAF-2, Tabs 77-79.

On February 23, 2010, the appellant moved to reopen the record to receive additional evidence identified

as newly discovered evidence. IAF-2, Tab 80. Through this motion, the appellant argues that on February 17, 2010, the agency's Office of the Inspector General (OIG) issued a report on the breach of SSI finding that the agency's Office of SSI violated many of its own SSI policies, resulting in the unauthorized release of SSI, without appropriate redaction. *See id.* The appellant argues that this evidence is material because the Office of SSI "cannot follow its own directives" then he should not have been removed as a FAM for the charge at issue. *Id.* The appellant adds that the controls for SSI were found to be defective and deficient creating inconsistency and confusion. *Id.* In response, the agency opposed the appellant's motion to reopen the record, arguing that the proffer is procedurally defective, untimely filed without good cause, speculative, and irrelevant. IAF-2, Tab 81. The agency argues that the OIG report involved "inadvertent" disclosures of SSI while the charged misconduct at issue involves an intentional disclosure. *Id.* The appellant thereafter replied to the agency's response, arguing that the OIG report was issued after the close of the record, and that it is relevant to the appellant's argument that the appellant acted in good faith under rules that were inconsistent and confusing. IAF-2, Tab 82. Through his reply, the appellant correctly points out that the "charge at issue[,]" distinct from the penalty consideration, "does not allege that Mr. MacLean intentionally disclosed SSI information[.]" *Id.* In responding to the appellant's reply, the agency argued the OIG report did not involve any law enforcement officers, and that the scope of the

report did not include any disciplinary actions. IAF-2, Tab 83. The agency further adds that the appellant's charged misconduct differs from using "the use of computer-made redactions that failed to conceal SSI permanently." *Id.*

In addressing another point through his underlying motion, the appellant states that Mr. Donzanti has, since the time of the actions at issue, been demoted to Deputy SAC, adding that Mr. Donzanti "is alleged by several current and former Los Angeles Federal Air Marshals" to have a past agreement with the Director of the agency's FAM Service (Director), based on "an illicit affair" with a subordinate FAM who was previously assigned to headquarters (subordinate FAM). IAF-2, Tab 80. The appellant explains that in 2004, under an agreement between Mr. Donzanti and the Director, the subordinate FAM was transferred from headquarters to Los Angeles and no disciplinary action taken against Mr. Donzanti, in exchange for Mr. Donzanti terminating the appellant at the direction of the Director. *Id.* The appellant argues that this 2004 agreement between Mr. Donzanti and the Director allowed the agency to issue the 2006 decision on the appealed removal at the field level, rather than the headquarters level. *See id.* In addition to the opposition above, the agency argues that the appellant could have introduced and/or cross examined Mr. Donzanti about these 2004 matters at the hearing, adding that the appellant deposed Mr. Donzanti in 2006. IAF-2, Tab 81. Through his reply, the appellant argues that the information about Mr. Donzanti is relevant to showing that Mr. Donzanti acted to ensure

his professional survival. IAF-2, Tab 82. Through its response to the reply, the agency argues that the motion on this issue is speculative and irrelevant. IAF-2, Tab 83.

While I have no reason to doubt that there have been subsequent breaches of SSI procedures by the agency employees as alleged, it is unclear how showing the occurrences of other such events constitutes good cause for reopening the record, in light of the fact that the evidence does not address what disciplinary actions or penalties, if any, were taken against or imposed on any agency employees, and the fact that the evidence does not affect whether or not the charged misconduct occurred.

With respect to the allegations involving Mr. Donzanti's change from SAC to Deputy SAC, and his interactions with the agency's headquarters personnel, the appellant fails to explain why these matters are being raised following the close of the record, since the appellant could have elicited testimony about these specific topics during Mr. Donzanti's deposition and/or during the hearing, prior to the record closing. *See* HCD. Specifically, in addition to having the opportunity to depose Mr. Donzanti, the appellant had a subsequent opportunity to question Mr. Donzanti about these matters at the hearing including his service as a Deputy SAC at the hearing:

> JUDGE KANG: Please state your full name for the record, spelling your last name.

THE WITNESS: Frank Joseph Donzanti, D-o-n-z-a-n-t-i.

JUDGE KANG: Mr. Donzanti, please state your current position and title for the record.

THE WITNESS: I am the Deputy Special Agent in charge of the Los Angeles Field Office for the Federal Air Marshal Service.

HCD. With regard to the role of headquarters and/or the Director, including the headquarters Policy Compliance Unit (PCU), the appellant's attorneys questioned Mr. Donzanti as follows:

Q. And did you work on this removal letter with anyone from—from Headquarters?

A. To some extent I may have had some impact. I don't remember exactly what it was. But most of the letter was drafted by Headquarters personnel. And that would be in HR, Human Resources.

Q. During—thank you. And during the entire process of deciding what to do about Mr. MacLean, did you work with the Policy Compliance Unit at Headquarters?

A. Yes, I did.

Q. And who were the—who was the supervisory official there that you worked with?

A. I believe it was—[BB] was the SAC at the time and [MM] was one of the ASACs.

Q. And who did [BB] report to?

A. At that time I'm not—I'm not sure who he reported to.

Q. So you don't know whether he reported to the Director or not?

A. It wouldn't be the Director. He would have reported to a Deputy Assistant Director, which one I'm not sure of.

Q. So it would have been either [the] Director [] or Director[]'s Assistant?

A. No, what—

Q. Is that correct?

A. I could explain it. You have a—you have a Director, you have a Deputy Director. Then you have an Assistant Director. Then you have a Deputy Assistant Director. So this person would be about four levels down the food chain.

MR. DEVINE: No further questions, Your Honor.

Id. In reviewing the appellant's arguments on these matters, the appellant fails to adequately explain why he could not have probed, elicited, or otherwise introduced these matters now raised, prior to the record closing. For the reasons set forth above, the appellant fails to show good cause for granting his motion on any of the bases raised, whether considered individually or in combination with one another. For these reasons, the appellant's motion to reopen the record is DENIED.

The Charge

As set forth above, the sole charge before the Board is Unauthorized Disclosure of SSI. IAF-2, Tab 67 at 5-6. To prove this charge, the agency must show that the appellant engaged in the conduct with which he is charged. *See, e.g., Otero v. U.S. Postal Service,* 73 M.S.P.R. 198, 201-205 (1997) (charge must be construed in light of accompanying specifications).

The underlying specification contains background information and alleges that on July 29, 2003, the appellant informed the media that all Las Vegas FAMs were sent a text message on their government issued mobile phones that all RON missions up to August 9th would be cancelled, or words to that effect, and that this constituted an improper disclosure of SSI because the media person to whom this information was disclosed was not a covered person within the meaning of SSI regulations, and the information about RON deployments was protected as SSI. IAF-2, Tab 67 at 5-6.

The Appellant's Testimony Regarding Training on Sensitive Information and SSI

In addressing this charge, the appellant testified that in November 2001, he attended FAM training. HCD. The appellant testified that during this month long training, the term "sensitive information" was used to describe flight times, flight numbers, and airline information. *See id.* In the months following the November 2001 training, the appellant testified

that he reviewed "a very thick pamphlet of a policy going into—into detail of—of what was SSI." *Id.*

When asked about the vacancy announcement and the conditions of employment for his FAM position, the appellant testified that he knew that disclosing of sensitive information was a basis for removal. *See id.* The appellant testified that in 2002, the issue of SSI was further addressed in training, stating:

> I signed a statement acknowledging that I—I attended a SSI training and read the—read the policy.

Id. The appellant further testified:

> Well, there were—there were a lot of publications that we were—that we were given. I—I don't remember exactly, but I believe there was a—there was a master—there was a master folder that had probably a quarter-inch thick of—of SSI policies, just very wordy. And you had to—you had to sign a acknowledgement that you—you—you read the policy and understood it.

Id. In explaining the 2002 training, the appellant testified:

> We were—we were distributed a list of—of issues that you just didn't—you didn't discuss, such as we were—we were given scenarios saying that some Air Marshals in the past had gotten in trouble for telling their significant others where to pick them up exactly, which gate, and which airline they were flying. It said a lot of guys have been—gotten in

> trouble and were *fired* for that, so you want to completely avoid it.

Id. (emphasis added). The appellant continued:

> So if somebody needs to pick you up from the airport, you need to give them a window and tell them, for instance, a baggage claim area, not an exact flight number and airline that they'll be—you'll be flying in on.
>
> . . . .
>
> The training was done in sort of hypothetical situations. If—if you needed somebody to pick you up from the airport, you—you had them wait for you in the baggage claim. You do not tell them the flight number that you were arriving on, or did you tell them origins, destinations of—of a particular flight because the big issue there was a lot of Air Marshals had gotten into a lot of hot water for telling people the flight numbers and the flight times of certain plane flying that—that they were going to come into.
>
> . . . .
>
> So it was very, very clear that you did not tell flight numbers and times of the flights you flew missions on.

Id. When asked about the known absence of FAMs on a particular flight, the appellant testified:

> If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.

Id.

The Appellant's Testimony Regarding the Text Message

The appellant testified that FAMs at that time were issued an encrypted password protected personal digital assistant (PDA) and a Nokia cell phone that the appellant believed was neither encrypted nor password protected in the same way as the PDA. *Id.*

The appellant testified that between July 26-28, 2003, "everybody in the country had received a text message to the Nokia phones" as follows:

> And the message simply stated that all overnight missions were going to be canceled—no—and you needed to can- —you needed to cancel your hotel reservations and call the office to get new schedules.

Id. The appellant testified that he did not understand this information to be SSI because the text was sent to his government issued cell phone rather than his PDA, explaining that while both devices were capable of handling text messages:

> I figured if—if they weren't going to send—if they didn't send text messages to the plain Nokias, if it was sent to the PDA, I assumed that it is more sensitive—it has some sensibility [sic] to it.

Id. The appellant further explained:

It—not only—it was—not only it didn't have any markings, SSI markings, not even a warning that this—don't disseminate this or—it had—it had nothing on there. It was just a—it was just a plain message.

Id.

The Appellant's Testimony Regarding OIG and the Reporter

In explaining the context of this point in time and his decision to call OIG, the appellant testified that FAMs had "just gotten the—this suicide hijacking alert that was issued" and that he and other FAMs were taking issue with the agency's dress code and grooming standards policy. *Id.* The appellant testified that he learned that the decision to cancel RON missions was one made at the headquarters level. *Id.* The appellant testified:

> It just seemed that the—the Agency had—had either lost control or was just making a grave mistake. And I decided, well, I'll try the OIG.

Id. The appellant testified that when he spoke with an OIG Special Agent (SA), the OIG SA informed him "there's nothing that could be done." *Id.* The appellant continued:

> And so it looked like it wasn't going anywhere. And after I hung up, I kind of stewed on this thing. And I decided to make a phone call to a reporter that had been doing some good reporting on—on TSA. I thought he wrote—wrote some very responsible articles
>
> . . . .
>
> I told him that there—there was a plan to remove Air Marshals off of all long-distance flights, and this was right after we just got our—our suicide hijacking briefings.

. . . .

> And the information, I believe, was—may have been potentially harmful had this plan ever gone into effect. I didn't think it was illegal, but I thought that what was happening was illegal and dangerous to the—to the public.
>
> . . . .
>
> There was—yeah, I believe there was—there was a very good possibility that he would have made it public. . . . . I didn't know the story was going to be as big as it was.

Id.

When asked about the specifics of his conversation with the reporter in relation to the specification before the Board, the appellant responded to the agency's questions as follows:

> Q. When you spoke to [the reporter] and disclosed the information to him, you told him that RON missions out of Vegas were being canceled; isn't that right?
>
> A. No, I did not.
>
> Q. You were specific to identify that the text messaging went to the Vegas Field—Federal Air Marshal; isn't that right?
>
> A. No, ma'am. Not at all.
>
> Q. You identified yourself as being from the Las Vegas Field Office; isn't that right?

A. Can I see the exhibit? I don't remember if I was identified as a Las Vegas Federal Air Marshal.

Q. You don't remember identifying yourself as coming from Las Vegas when you were talking about these—

A. I don't remember. I thought you were referring to the article.

Q. I'm referring to your discussions with Mr. Meeks.

A. I—I don't remember if I told him I was—I was based in Las Vegas or not.

Q. But you told him that the text messaging went to officers from Las Vegas Field Office; isn't that right?

A. I don't remember saying specifically Las Vegas, because I knew there were Air Marshals across the country that were getting the same message.

Q. In fact, that's what you also told the investigator at the time that the Office of Professional Responsibility was looking into it; isn't that right?

A. Can I—can I re- —I don't know that verbatim. If that's the- —if that's what the affidavit states, I —I need to read it. I don't know specific—I do not know from memory if I told anybody—if I stated that I—I identified to [the reporter] that it was Las Vegas Air Marshals.

Id. Upon redirect by his counsel, the appellant testified as follows:

> Q. Are you aware whether there are any other sources of information to Mr. Meeks in his various articles other than yourself?
>
> A. Yes. His [the reporter's] subsequent article stated there was more than one source, and he sent me and my attorney, my former representative in this case, that there were—there were more than one. So there were three sources that he—that he spoke to.

Id.; IAF-2, Tab 63, Exhibit RRR (email from the reporter to the appellant's attorney submitted by the appellant). Through his testimony and the referenced email, the appellant appears to challenge the specification at issue in this charge. *Hillen v. Department of the Army,* 35 M.S.P.R. 453, 458 (1987).

In observing the appellant's testimony at the hearing, I found the appellant to be evasive, nuanced, and inconsistent. *Id.* Throughout his testimony, the appellant insisted that he did not believe that the text message above constituted SSI or was sensitive information because it was delivered to his government issued cell phone rather than his PDA. *Id.;* HCD. However, as set forth above, the appellant also testified that based on his SSI training, he understood that he was to "completely avoid" telling anyone "where to pick them up exactly, which gate, and which airline they were flying" because it could lead one to learn which flight or flights were secured by a FAM or FAMs. *Id.* The appellant then testified that "If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific

flight" because, presumably, this information would lead one to learn that a particular flight was *not* secured by a FAM. *Id.* The appellant's testimony that revealing the presence or absence of a FAM on a particular flight and/or gate in the circumstances above is inconsistent and contrary to his assertion that canceling RON missions for a specified period "was just a plain message" rather the type of message discussed in his SSI training, because such a disclosure necessarily conveys the latter scenario addressed by the appellant above. *Id.* The appellant's assertion that this specific information could not have been sensitive because the text was delivered to his government issued cell phone rather than the PDA, without SSI markings, is inconsistent with his own testimony, and improbable under these circumstances.

Further, the appellant's flat denial that he informed the reporter that RON missions out of Las Vegas were being cancelled is belied by the appellant's sworn and written statement of May 4, 2005, wherein the appellant specified that he informed the reporter that all Las Vegas FAMs were sent a text message to their government issued mobile phones that all RON missions up to August 9, 2003 would be cancelled. *Id.;* IAF-1, Tab 4, Subtab 4J (appellant's affidavit). To the extent the appellant argues that he could not have been the source for the reporter's story because he, as a law enforcement officer, would not break the law to prevent the agency from executing the actions above, which the appellant believed were incorrect, this assertion is also belied by the appellant's affidavit. *Id.* Specifically, the appellant previously stated in a sworn

statement that he had "NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative . . . reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies" because his chain of command, OIG, and Members of Congress had "all ignored my complaints[.]" *Id.* The appellant agreed that during his deposition, he testified under oath that it did not matter whether or not the information conveyed to the reporter was SSI. *Hillen,* 35 M.S.P.R. at 458; HCD; IAF-2, Tab 44, Exhibit 8 at 2.

In observing the appellant at hearing, I found that the appellant's attempts to distinguish, explain, and qualify his prior written statements under oath, as well as his deposition testimony, were not persuasive. *Hillen,* 35 M.S.P.R. at 458. Indeed, observing the appellant's hearing testimony highlighted the sentiment expressed by the appellant during his May 4, 2005 interview, and illustrated that the appellant was, to some degree, acting on his frustration with OIG and his superiors, in conveying information to the reporter, rather than a belief that the text message at issue was not SSI as stated at the hearing. *Id.* For these reasons, to the extent the appellant now denies that he conveyed the information specified above involving RON missions out of Las Vegas, I find that the appellant's testimony to this effect is not creditable. *Id.*

Based on a careful review of the record evidence, in particular the sworn statement and testimony of the appellant, I find that the agency has shown by preponderant evidence that on July 29, 2003, the appellant

informed the reporter that all Las Vegas FAMs were sent a text message on their government issued mobile phones that all RON missions up to August 9th would be cancelled, or words to that effect. *Hicks v. Department of the Treasury,* 62 M.S.P.R. 71, 74 (1994). With respect to the characterization of this information, the Ninth Circuit has ruled that the information contained in the text message qualifies as SSI because it contained specific details of aviation security measures regarding deployment and missions of FAMs. *Id.; MacLean,* 543 F.3d 1145. Accordingly, I find that the agency has met its burden of proving by preponderant evidence that information on RON deployments at issue was SSI; I further find that the agency has met its burden of proving by preponderant evidence that the information disclosed by the appellant to the reporter on July 29, 2003 was SSI. *Id.*

With respect to the reporter's status, the appellant does not dispute that if the information at issue was SSI, the reporter was not authorized to receive this information. *See* HCD (testimony of the appellant). Within the agency's SSI regulations, the agency has shown, and the appellant has not disputed, that the reporter was not a person with a "Need to Know" within the meaning of the Interim SSI Policies and Procedures in effect as of November 13, 2002. IAF-1, Tab 4, Subtab 4N. Accordingly, I find that the agency has shown by preponderant evidence that the media person to whom the SSI was disclosed, was not a covered person within the meaning of SSI regulations. *Hicks,* 62 M.S.P.R. at 74. Because this person was not authorized to receive this SSI, I find that the agency

has shown by preponderant evidence that the disclosure of the SSI by the appellant to the reporter was unauthorized. *Id.*

For the above reasons, I find that the agency has proven the factual assertions as set forth in the specification underlying this charge. The specification is SUSTAINED. I further find that the agency has shown by preponderant evidence that the appellant engaged in the unauthorized disclosure of SSI as charged. *Id.; see, .e.g., Otero,* 73 M.S.P.R. at 201-205. The charge is SUSTAINED.

Affirmative Defenses

The appellant has the burden of proving his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(iii). Following a discussion with the appellant's attorneys about the affirmative defenses in this appeal, the appellant clarified that he was alleging that the agency discriminated and retaliated against him based on his membership and leadership status with a professional association[2] (PA) for other than merit reasons in violation of 5 U.S.C. § 2302(b)(10); and that this alleged discrimination and retaliation violated his First Amendment rights. No other affirmative defenses are alleged in this appeal. IAF-2, Tab 67 at 5-6.

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[2] It is undisputed that the appellant does not belong to a recognized union, and that none of his activities in a professional association constituted protected union activities. IAF-2, Tab 67 at 5-6 (prehearing conference summary with the appellant's attorneys and an agency representative).

The Appellant's Claim Under Section 2302(b)(10)

Section 2302(b)(10) prohibits discrimination for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others. The appellant argues that the agency took the actions at issue in this appeal based on his service with a chapter of the Federal Law Enforcement Officers Association (FLEOA). The appellant specifies that approximately one month after conveying the information to the reporter as set forth in the specification discussed above, he began working on the Federal Air Marshal Service (FAMS) chapter of the FLEOA, thereafter serving as the chapter's executive vice president as follows:

> About two to three weeks af- —I'd say about—about a month after I made my July 2003 disclosure, I began to organize the—and I cofounded the Federal Air Marshal Service Chapter within the Federal Law Enforcement Officers Association.

HCD (testimony of the appellant). The appellant testified that he "became a hot target for—by Headquarters" because he was the "number-two guy" in the chapter. *Id.* In discussing the OPR investigation underlying the charge and specification, the appellant testified as follows based on questions posed by his attorneys:

> Q. Well, okay. So after the disclosure did you become aware that there was an investigation at some point, whenever it was?

A. Yes.

Q. How long after the disclosure was there an investigation?

A. Approximately 13—13 months.

Q. Okay. And—

A. I'm sorry. That's—that's incorrect. I had no —it would have been—it would have been approximately 23 months, 22 months when I knew there—I was under investigation for the—for the SSI disclosure.

Q. Okay. And when you first became aware of the investigation; was it for the SSI issue or were there other issues that you—that were involved?

A. Well, the investigation initially was started because of my appearance on [an evening national network news program]. And I was told by a supervisor in the field office that the Special Agent in Charge has begun an investigation to find out who was the Air Marshal on that program.

Q. Okay. And how soon after your appearance on that program that you became aware that you were the subject of an investigation?

A. Within days.

Q. Okay. And what did you understand the scope and the issues in that investigation were, initially?

A. They just wanted to know who was—it—it was —it was impossible any sensitive security information or classified information was divulged during my interview, so—

Q. With [the national network news anchor]?

A. That's correct.

Q. Okay.

A. It was just who find—just to find out who was —who was on the [evening national network news] program.

Q. Okay. And during the course of that investigation did there come a time when you informed the investigators that you—you had disclosed this information that the Agency considers to be SSI?

A. Yes. Approximately seven months later in May of—early May, the Of- —the Immigration and Customs Enforcement, Office of Professional Responsibility, ICE OPR, the investigators came in and gave me a pep talk, saying, "Be completely and fully forward here. You do not want to lie to us,"—

Q. Um-hum.

A. —"because we will find out. So you need to tell us everything."

Q. And they asked you about that?

A. They asked me if I was the person, and I said yes.

Q. Um-hum.

Id. In relating his FLEOA activities to the investigation and OPR[3] interview, the appellant testified that he became involved in creating the FAMS chapter of FLEOA approximately two to four weeks after disclosing the SSI because "I figured the best way to start addressing these problems was in a collective voice. . . . And that's where things started getting very hectic." HCD.

When asked about his involvement with FLEOA, Mr. Donzanti testified that while he did not recall whether he was a member "on that exact date[,]" he has been a member of FLEOA for 25 years. HCD. To the extent the appellant argues or implies that Mr. Donzanti manipulated the ICE OPR ROI, it is undisputed that Mr. Donzanti did not speak to any of the individuals conducting the investigation and/or writing the ROI at issue. *Id.* (cross examination of Mr. Donzanti by the appellant). Further, there is nothing in the record to indicate that Mr. Donzanti or anyone else in FAMS had the ability to manipulate an active ICE OPR investigation and/or manipulate an actual OPR ROI. *See id.*

While the appellant's involvement m FLEOA did indeed precede the investigation and OPR actions, the appellant's testimony at hearing reflects that his unauthorized appearance on a national network news program, rather than his FLEOA activities, was the

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[3] It is undisputed that ICE, rather than TSA, conducted the underlying investigation and wrote the ROI at issue. *See* HCD (testimony of Mr. Donzanti and the appellant).

catalyst the OPR's investigative actions including the ROI and investigative interview. *See* HCD. Specifically, even though the appellant asserts that he become a "hot target" after he began organizing and leading a chapter of FLEOA in or about August 2003 as set forth above, the appellant himself points out that the investigative actions did not occur until approximately 22 months after he began organizing and leading the chapter. *See id.* To the extent any particular event served as the catalyst for the OPR investigative actions and ROI, the appellant testified that the investigation was started "within days" of his unauthorized appearance on an evening news program, specifying that it was "started because of my appearance" on the evening national network news program. *Id.* After carefully reviewing the record evidence, including the matters discussed above, I find that the appellant has failed to show by preponderant evidence that the agency discriminated and retaliated against him based on his membership and leadership status with the FLEOA. I further find that the appellant has failed to show by preponderant evidence that the agency took the actions at issue in this appeal based on his membership and leadership in FLEOA. IAF-2, Tab 67 at 5-6.

Appellant's First Amendment Claim

The Supreme Court has recognized that public employees, like all citizens, enjoy a constitutionally protected interest in freedom of speech. *Connick v. Myers,* 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Pickering v. Board of Educ.,* 391 U.S. 563,

568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Smith v. Department of Transportation;* 106 M.S.P.R. 59, 78-79 (2007). Employees' free speech rights must be balanced, however, against the need of government agencies to exercise "wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Mings v. Department of Justice,* 813 F.2d 384, 387 (Fed. Cir. 1987) (quoting *Connick.* 461 U.S. at 146). Thus, in determining the free speech rights of government employees, a balance must be struck between the interest of the employees, as citizens, in commenting on matters of public concern, and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering,* 391 U.S. at 568; *Mings*, 813 F.2d at 387; *Sigman v. Department of the Air Force,* 37 M.S.P.R. 352, 355 (1988), *aff'd,* 868 F.2d 1278 (Fed. Cir. 1989) (Table). In addressing the issue of whether employee speech is protected by the First Amendment, the Board must determine: (1) whether the speech addressed a matter of public concern and, if so, (2) whether the agency's interest in promoting the efficiency of the service outweighs the employee's interest as a citizen. *Smith,* 106 M.S.P.R. at 79.

In this case, the agency argues that the appellant's disclosure of SSI does not meet the first prong of the test above because exact nature of any particular deployment or mission is not a matter of public concern. IAF-2, Tab 77. While this argument may apply to a specific mission, the communication at issue involved the potential cancellation of all RON missions out of

Las Vegas within the context of a flying public that feared another terrorist attack involving commercial aviation aircraft. *See* HCD (testimony of the appellant and Mr. Donzanti). The potential presence of, or known lack of presence of FAMs on specific types of flights is understandably a matter of public concern because it affects the chances that a terrorist will target the specific flights at issue; in this case, the disclosed SSI directly involved such information. *See id.* Accordingly, I find that the appellant's disclosure at issue satisfies the first prong of this test.

Citing *Pickering,* 391 U.S. at 568, the appellant argues that the information conveyed by the appellant did not cause any harm to the agency mission; rather, the appellant asserts that his actions increased the efficiency of the service in that his disclosure of SSI addressed a vulnerability to aviation security. IAF-2, Tab 79. The appellant argues that the cancellation of RON missions at issue was "illegal and seriously threatened America's national security[.]" *Id.* The appellant argues in the alternative that even if TSA had not changed its decision on the RON missions, "the threat would have been minimized by the advance nature of the disclosure six days before the policy was scheduled to take place." *Id.* The appellant argues that based on the second prong of the balancing test, the agency's action must be barred as a matter of law. *Id.;* IAF-1, Tab 4, Subtab 4C.

In addressing this issue of whether the agency's interest in promoting the efficiency of the service outweighs the employee's interest as a citizen, Mr.

Donzanti testified as follows upon questioning by the appellant's attorneys:

> Q. Was there any actual harm from Mr. MacLean's disclosure?
>
> A. There could have been. From my perspective, I—I know that the division that—
>
> Q. Excuse me, sir. I didn't say "could have." Was there any actual harm? Do you know of any?
>
> A. Well, I'm going to explain that in a minute. We have a division that schedules flights. And in light of that disclosure that Mr. MacLean made, now they would have to do excessive work to either correct that or make some decisions. It would be conversations, and it would be work lost. And ultimately some kind of risk associated with the fact that the people that are scheduling flights and—and looking at intelligence are now busy rescheduling flights or doing whatever they had to do to kind of make a correction here with this vulnerability that now existed.

HCD. Further addressing the effect of the appellant's disclosure on the efficiency of the FAMS and its mission to protect flights, Mr. Donzanti testified:

> Well, he gave information on our—on our flights, a particular group of flights that were not covered, which created a vulnerability. As soon as he gave that information out to the media, it *created* a vulnerability within the aviation system. And it set us up for a possible another 9/11 incident.
>
> . . . .

> "How so?" Well, it gave people that would want to do us harm information that certain flights weren't covered by Air Marshals. And if you look at that, it makes the system vulnerable, especially with flights leaving out of Las Vegas, knowing that certain flights aren't covered, long-distance flights are not being covered by Air Marshals.

Id. (italics added). At the heart of this question is whether the vulnerability at issue is the absence of FAMs on RON missions out of Las Vegas, or the appellant's disclosure of this specific facet of Las Vegas FAM deployments for a specific forward date; for the reasons that follow, I find that the latter was applicable.

This matter of FAM deployments is directly related to the FAMS and TSA core mission because the potential and actual presence of one or more FAMs on any particular flight or class of flights is a critical deterrent and/or countermeasure for a terrorist high jacking commercial passenger aircraft. HCD (testimony of the appellant and Mr. Donzanti). Related to this point, the ability to deploy without being readily identified on sight by other aircraft passengers is an important factor in a FAM's effectiveness, because of the positive uncertainty that is then created on flights that are not actually protected by one or more undercover armed FAMs. *See, e.g.,* HCD (testimony of the appellant). Conversely, as pointed out by the appellant:

> If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.

HCD (testimony of the appellant).

In this case, the agency appears to agree with the appellant's assertion that his disclosure did not harm the Las Vegas RON flights at issue, and explains what steps were taken to directly address the RON missions for the specific period at issue. *See* HCD (testimony of Mr. Donzanti). Indeed, I have no reason to doubt that the appellant's disclosure at issue improved FAM presence on Las Vegas RON flights up to August 9, 2003, based on the undisputed fact that agency resources were then reallocated to some degree to address these specific Las Vegas RON flights. *See id.* However, it is this allocation of resources within the mission of the FAMS and the TSA, and the inability to cover every commercial passenger flight that remains at issue. *See id.*

As pointed out by Mr. Donzanti, the deployment of FAMs is driven by factors, including "intelligence" gathered and considered. *See id.* While the appellant's actions may have indeed strengthened FAM presence on the Las Vegas RON mission flights as asserted, it was counter to the agency's interest in promoting the efficiency of the service because, in addition to considering "intelligence" and other factors, the agency was compelled to shift resources, explaining, "in light of that disclosure that Mr. MacLean made, now they would "have to do excessive work to either correct that or make some decisions." *Id.* Specifically, given the limited number FAMs both in Las Vegas within the broader agency, and given the presumably finite resources of FAMS, TSA, and the

broader agency, the agency correctly points out that the result of this disclosure that there would be no FAMs on forward RON missions out of Las Vegas for the period specified, forced the agency to shift resources to address this disclosure. *See id.* In addressing this issue, Mr. Donzanti further explained, "the people that are scheduling flights and—and looking at intelligence are now busy rescheduling flights or doing whatever they had to do to kind of make a correction here with this vulnerability that now existed." *Id.*

This issue of limited resources and/or inability to staff all commercial passenger flights at all times nationwide and/or worldwide with armed FAMs is what makes FAM deployment a matter of import. *See* HCD (testimony of the appellant). The importance of protecting FAM deployment information in light of the reality that not all commercial passenger flights are protected by armed FAMs was acknowledged to some degree by the Ninth Circuit while adjudicating the petition for review of the SSI AFO at issue:

> Section 1520.7(j) (2003) designates as "sensitive security information . . . [s]pecific details of aviation security measures . . . applied directly by the TSA . . . [which] includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." Information falling within this designation is *automatically* considered "sensitive security information" without further action from the TSA. 49

> C.F.R. § 1520.7 (2003). The TSA has authority to designate information as "sensitive security information" pursuant to 49 U.S.C. § 114(s) and 49 C.F.R. § 1520.
>
> The information contained in the text message qualifies as "sensitive security information." The message contained "specific details of aviation security measures" regarding "deployment and missions" of Federal Air Marshals. 49 C.F.R. § 1520.7(j) (2003). That there could have been more specific information in the message does not undermine this determination. *See id.*

MacLean, 543 F.3d 1145 (italics added). While I have no reason to doubt the appellant's assertion that he took these actions to benefit the nation and to increase the efficiency of the service, I find that the appellant's actions undermined the efficiency of the service for the reasons discussed above.

Following a careful review of the record evidence, I find that the agency's interest in promoting the efficiency of the service outweighs the employee's interest as a citizen. *See Smith*, 106 M.S.P.R. at 79. To the extent the appellant maintains that the agency violated his First Amendment right of free association based on his contacts with the media, I find that the agency took these actions not for associating with the reporter, but for the conduct as charged and sustained above, pursuant to the findings and discussion above. *Broadnax v. Department of Transportation*, 15 M.S.P.R. 425 (1983); *Isoldi v. Department of Transportation*, 16 M.S.P.R. 471 (1983). To the extent the appellant

maintains that the agency violated his First Amendment right of free association based on his involvement in the FLEOA, I find that the agency took these actions not for associating with this PA, but for the conduct as charged and sustained above, pursuant to the findings and discussions above, including the findings and discussions of the appellant's claim under section 2302(b)(10). *Id.* Consequently, the appellant's affirmative defenses are not sustained.

Nexus and Penalty

When such charges of misconduct are sustained by preponderant evidence, the agency must show that there is a nexus between the sustained charges and either the employee's ability to accomplish his duties satisfactorily or some other legitimate government interest. *See Merritt v. Department of Justice,* 6 M.S.P.R. 585, 596 (1981), *modified, Kruger v. Department of Justice,* 32 M.S.P.R. 71, 75 n.2 (1987). Here, there is clearly a direct relationship between the appellant's conduct as described in the charge above, and the appellant's workplace, because all of the appellant's actions were enabled by his position as a FAM, and directly impacted the mission of his workplace, FAMS, TSA, and the agency. To this point, Mr. Donzanti testified that it "created a vulnerability" by identifying "a particular group of flights that were not covered[.]" HCD. Mr. Donzanti explained that based on this disclosure, individuals "looking at intelligence are now busy rescheduling flights or doing whatever they had to do to kind of make a correction here with this vulnerability that now existed." *Id.*

Indeed, the appellant testified that if he told someone that a particular flight would not have "any protection on it," that particular flight would be "endangered[.]" HCD. As set forth above, the appellant disclosed SSI in a manner that identified a category of flights from a specific city, thereby "endanger[ing]" those specific flights that are to be protected by this agency. *Id.* Thus, I find that nexus has been established.

Where, as here, all of the agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 306 (1981). In making that determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to insure that management discretion has been properly exercised. *See, e.g., Brown v. Department of the Treasury,* 91 M.S.P.R. 60, ¶ 7 (2002). Thus, the Board will disturb the agency's chosen penalty only if it finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceeded the limits of reasonableness. *Toth v. U.S. Postal Service,* 76 M.S.P.R. 36, 39 (1997).

The deciding official in this case, Mr. Donzanti, testified regarding his consideration of the *Douglas* factors. HCD. The record reflects that Mr. Donzanti considered the relevant factors, most notably the na-

ture and seriousness of the offense, which involved the FAMS mission of protecting flights, stating:

> [H]e gave information on our—on our flights, a particular group of flights that were not covered, which created a vulnerability. As soon as he gave that information out to the media, it created a vulnerability within the aviation system. And it set us up for a possible another 9/11 incident.
>
> . . . .
>
> Well, it gave people that would want to do us harm information that certain flights weren't covered by Air Marshals. And if you look at that, it makes the system vulnerable, especially with flights leaving out of Las Vegas, knowing that certain flights aren't covered, long-distance flights are not being covered by Air Marshals.

HCD. The agency considered this a serious matter because the disclosure of this specific FAM deployment information directly related to the appellant's duties, position, and responsibilities as a FAM. *See id.; see, e.g.*, HCD (testimony of the appellant). With respect to the appellant's argument that no actual harm resulted from the appellant's misconduct because the RON missions were thereafter covered, Mr. Donzanti responded related questions posed by the appellant's attorneys as follows:

> Q. And was there any direct harm from Mr. MacLean's disclosure?
>
> A. It created vulnerability as soon as he made the disclosure. That would be the harm.

> Q. Now "vulnerability" is kind of a speculative concept. Was there any direct harm that actually occurred from his disclosure?
>
> MS. CALAGUAS: Objection, move to strike the argumentative comment.
>
> JUDGE KANG: The motion to strike is denied. You know, I'm the Judge here. You don't have to worry about me taking things out of context here. Please repeat your question, Mr. Devine, for clarity.
>
> MR. DEVINE: Yes, sir.
>
> BY MR. DEVINE:
>
> Q. Was there any actual harm from Mr. MacLean's disclosure?
>
> A. There could have been. From my perspective, I—I know that the division that—
>
> Q. Excuse me, sir. I didn't say "could have." Was there any actual harm? Do you know of any?
>
> A. Well, I'm going to explain that in a minute. We have a division that schedules flights. And in light of that disclosure that Mr. MacLean made, now they would have to do excessive work to either correct that or make some decisions.

Id. While the parties disagreed on this aspect of evaluating the seriousness of the misconduct based on how "harm" is defined, the record reflects that Mr. Donzanti considered this factor as more fully discussed in the First Amendment discussion above.

Although this conduct was not frequent or committed for gain, Mr. Donzanti determined that it was intentional because it involved an intentional contact with the reporter, and the conveyance of an intentional statement concerning SSI. *Id.* In describing the clarity of notice, Mr. Donzanti testified that the offense did not involve an obscure security regulation, rather, it was "just very basic[.]" *Id.*

To these points, the appellant argues that he did not intend to disclose SSI, explaining that as a law enforcement officer, he would not break the law in this manner. HCD. However, as noted above, the appellant stated in a sworn statement that he had "NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative . . . reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies" because his chain of command, OIG, and Members of Congress had "all ignored my complaints[.]" *Id.;* IAF-2, Tab 4, Subtab 45. Moreover, the appellant acknowledged that during his deposition, he testified under oath that it did not matter whether or not the information conveyed to the reporter was SSI. HCD; IAF-2, Tab 44, Exhibit 8 at 2. To the extent the appellant argues that he was confused as to whether or not this information at issue was SSI, thus did not intentionally convey SSI, because the agency failed to properly transmit this information through the encrypted PDA and/or because the agency failed to transmit the text message with SSI markings as required, and/or because the agency failed to take other precautions as required, I do not

credit the appellant's assertions because the appellant's assertions are not creditable for the reasons set forth below. *Hillen,* 35 M.S.P.R. at 458; *see Hawkins v. Smithsonian Institution,* 73 M.S.P.R. 397, 403-04 (1997).

Throughout his testimony, the appellant insisted that he did not believe that the text message above constituted SSI or was sensitive information because it was delivered to his government issued cell phone rather than his PDA. *Id.;* HCD. However, as set forth above in the discussion of the facts underlying the charge, the appellant also testified that "If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight" because, presumably, this information would lead one to learn that a particular flight was *not* secured by a FAM. *Id.* The appellant's testimony that revealing the presence or absence of FAMs on particular flights is inconsistent and contrary to his assertion that canceling RON missions for a specified period "was just a plain message" rather the type of message discussed in his SSI training, because such a disclosure necessarily conveys the type of information described by the appellant as SSI based on his training in 2002, prior to his July 2003 contact with the reporter. *Id.* The appellant's recollections of his training as a new FAM and his subsequent training on SSI in 2002, undermine his assertion that he did not intend to convey SSI, because they evince his understanding that deployment of or the absence of FAMs on particular flights was understood by the appellant to be SSI. *Id.* Based on my, observations of the appellant at the

hearing, and for the reasons set forth above inclusive of the prior credibility determination, the appellant's assertion that he believed that the text involving RONs was "just a plain message" and not SSI, is not creditable. *Hawkins*, 73 M.S.P.R. at 403-04.

Related to this point, Mr. Donzanti explained that the appellant knew that disclosing SSI in this manner was an offense, and that the information at issue "speaks directly to schedules" because it conveys the "mission tempo" and involves the presence of FAMs on types of flights. *See* HCD. In observing the appellant's testimony at hearing, I noted that the appellant's testimony similarly reflected that the appellant was on actual notice about the type of conduct in question, prior to July 2003, as follows:

> We were—we were distributed a list of—of issues that you just didn't—you didn't discuss, such as we were—we were given scenarios saying that some Air Marshals in the past had gotten in trouble for telling their significant others where to pick them up exactly, which gate, and which airline they were flying. It said a lot of guys have been—gotten in trouble and were fired for that, so you want to completely avoid it.

HCD. The appellant also testified:

> If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.

Id. For the reasons explained above and consistent with those findings, I was not persuaded by the appel-

lant's assertion that he had not been warned about the conduct in question. *Hawkins,* 73 M.S.P.R. at 403-04.

To the extent the appellant maintains that the AFO constituted an impermissible retroactive agency adjudication affecting the notice factor, the Ninth Circuit addressed this specific argument:

> The TSA order does not constitute a retroactive agency adjudication. Rather, the agency applied regulations that were in force in 2003 to determine that information created in 2003 was "sensitive security information." This differs from *Bowen,* where the Court held that the Department of Health and Human Services could not apply a new rule requiring private hospitals to refund Medicare payments for services rendered before the rule existed. *See id.* at 208-09, 215-16, 109 S. Ct. 468. The TSA order comports with the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (internal quotation omitted). We reject MacLean's claim.

MacLean, 543 F.3d at 1152. The record reflects that Mr. Donzanti also considered the status of this information as of the date of the disclosure, in considering the intentional nature of the offense and notice, as set forth above. HCD.

In considering the appellant's job level and type of employment, Mr. Denzanti testified that the offense at issue was related to his position as a FAM, because the

appellant was in a public safety position with the responsibility to guard SSI of this sort. *See* HCD. On this point, the Board has previously recognized that law enforcement officers may be held to a higher standard of conduct with respect to the conduct expected of them and the severity of the penalty invoked for failure to meet those expectations. *See Todd v. Department of Justice,* 71 M.S.P.R. 326, 330 (1996).

In addressing the notoriety of the offense, Mr. Donzanti explained that the misconduct brought discredit to the FAMS because it undermined the public's confidence in the agency's ability to prevent a terrorist attack involving commercial passenger aircraft. HCD. Given the importance of the FAM mission, Mr. Donzanti explained that this misconduct went beyond embarrassing the agency, and otherwise explained how the appellant's actions negatively affected the efficiency of the agency's operations. *See id.*

In considering mitigating factors, Mr. Donzanti testified that he considered the fact that the appellant did not act for personal gain. Mr. Donzanti testified that he considered the appellant's lack of prior discipline, his work history, his length of service, and the appellant's satisfactory performance on the job. *Id.* Indeed, Mr. Donzanti testified that the appellant was dependable, showed up for work on time, and that he performed his job "in an exemplary manner[] Minus the incident he had in Las Vegas[.]" *Id.* Mr. Donzanti testified that he also considered the appellant's ability to get along with other employees as a positive factor. *Id.* However, Mr. Donzanti testified that

these mitigating factors did not outweigh the seriousness of this offense. *See id.*

Mr. Donzanti testified that he also considered the appellant's explanation of the mitigating circumstances surrounding the offense as follows:

> He thought there was a vulnerability created in the system when there was—when those types of missions were dropped, when they were not covered. But he is not in a position—he does not have all information. He's not in a position to make that kind of decision. There are other factors that go into that decision he would be unaware of. As he may have good intentions, but he was—he was misguided and didn't have all the information.

Id.

In describing the consistency of the penalty with those imposed on other employees, Mr. Donzanti testified that he was not aware of any similar incidents while he was serving at that duty station as the SAC. *Id.* In *Woebcke v. Department of Homeland Security,* MSPB Docket No. NY-0752-09-0128-I-1, slip op. (Opinion and Order, May 6, 2010), the Board stated that the consistency of the penalty imposed on an appellant may be compared to that of another, even though the two employees are supervised by differing chains of command. In this case, it is undisputed that Mr. Donzanti coordinated w1th the PCU and the headquarters human resources office (HR) in taking this action. HCD (testimony of Mr. Donzanti). Mr. Donzanti testified that PCU serves a coordination role: "They will make sure ·certain entities get information

that's needed." *Id.* In explaining the role of HR in his decision to remove the appellant, Mr. Donzanti explained that although HR drafted text of the decision letter, he reviewed the draft and adopted it, and that he made the ultimate decision to remove the appellant. *Id.*

To the extent the appellant attempted to identify comparators from different chains of command, the appellant argued that he was similarly situated to FAMs A.R., J.S., J.M., but that they received lesser sanctions for their offenses. *See, e.g.,* IAF-2, Tab 39 at 15-16. According to the appellant's submission, A.R. posted on an internet message board that flights were being cancelled on a specified international route. *Id.* The appellant's submissions reflect that the information conveyed to this message board was not learned through any official agency source, rather, the information was "solely the result of second or third hand information FAM [A.R.] had received via the FAM grapevine." IAF-2, Tab 45, Exhibit F. The appellant's submission further stated, "FAM [A.R.'s] only intent in posting the information was to confirm whether the information/rumor he had heard was accurate." *Id.* In contrast to the circumstances surrounding A.R.'s decision to post unverified information to a message board, the appellant's misconduct involved the appellant (a) receiving SSI from the agency on his government issued official cell phone; (b) then verifying the authenticity and accuracy of this SSI by "speaking with the supervisor[;]" (c) then seeking out a well-known reporter; and (d) then disclosing SSI to the reporter. *See* HCD (testimony of the appellant).

Under these circumstances as presented by the appellant, the appellant's offense and that of A.R. are neither the same nor similar. *Cf. Woebcke,* slip op.

With regard to J.S., the record reflects that J.S. improperly identified himself and his partners to aircraft passengers, but was only suspended prior to his resignation. IAF-2, Tab 45, Subtab MM; *see, e.g.*, IAF-2, Tab 39 at 15-16. According to the appellant's submissions, while flying on a mission, J.S. revealed his FAM status and that of his partner to a passenger and information about the next segment of his mission. *Id.* The appellant's submissions reflect that J.S. broke his cover to a passenger seated next to him because the passenger saw that J.S. was carrying a firearm while onboard the aircraft and asked J.S. how J.S. was able to bring a firearm onto a commercial passenger aircraft. *Id.* The appellant's submissions reflect that J.S. revealed his identity as a FAM to avoid a general panic onboard the aircraft, because of the firearm. *Id.* While J.S. may have revealed more information than necessary to this single passenger, the circumstances and nature of the appellant's offense and that of J.S. are neither same nor similar, because, *inter alia,* identifying himself as a law enforcement officer to explain his possession of a firearm during a flight differs from the appellant's decision to share SSI with the reporter as set forth in (a) through (d) above. *See id.* With regard to J.M., the appellant states that J.M. shared his flight information with flight attendants in order to coordinate meetings with these flight attendants in his hotel room, for personal reasons. *See, e.g.,* IAF-2, Tab 39 at 15-16. While J.M.'s actions

likely involved the disclosure of SSI, the circumstances and nature of the appellant's offense and that of J.S.; are neither same nor similar, because, *inter alia,* sharing his flight information with individual airline employees and/or airline flight attendants differs from the appellant's decision to share SSI with the reporter as set forth in (a) through (d) above. *Cf. Woebcke,* slip op. Although the agency did not have a formal table of penalties applicable to the appellant at that time, Mr. Donzanti's testimony reflects that he considered and applied the agency's Interim Policy for Addressing Performance and Conduct Problems effective July 29, 2002, in making his penalty determination, which included consideration of lesser sanctions addressed below. HCD.

In considering the appellant's potential for rehabilitation and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future, Mr. Donzanti explained that while he considered other sanctions, he concluded that no lesser penalty was appropriate based on the seriousness of the offense at issue and because all administrative or law enforcement positions in TSA gives one access to SSI "almost on a daily basis." *Id.* In explaining his conclusion that no alternate sanction or position would be appropriate, Mr. Donzanti explained that the management had "all lost confidence in his ability at that point." *Id.* Mr. Donzanti further explained that in considering the appellant's potential for rehabilitation, the appellant had "no remorse whatsoever." *Id.* Mr. Donzanti's testimony on this point is consistent with the appellant's testimony at the hearing, inclusive of his

testimony regarding his deposition statements, as well as his sworn statement to OPR. *See* HCD.

When asked, by the appellant's attorneys, about the appellant's interim status following the discovery of the appellant's misconduct, Mr. Donzanti testified as follows:

> Q. Okay. Let's continue on this course of whether he was—this issue of whether there was potential for rehabilitation. When did you learn that Mr. MacLean had made an unauthorized release of SSI?
>
> A. Probably sometime in—in July of '05, I believe.
>
> Q. And when did he stop performing his duties as an Air Marshal on your watch?
>
> A. It was October that same year.
>
> Q. Okay. So during that five-month interval did you take any steps to protect the Government against this untrustworthy employee who was on the frontlines of defending against security breaches?
>
> A. It was—it was approximately three months, and not anything that we normally wouldn't do, and he'd be involved in training during that time period.
>
> Q. Did you take any extra precautions? I mean this is untrustworthy agent here who's on the front lines. What precautions did you take to make sure that he didn't endanger our country's security again?
>
> A. Nothing that I can recur [sic] that—additional to training.

Q. Okay. Did you take any action against his security clearance because of the trustworthiness problem?

A. That is not in my purview. So I did not.

. . . .

Q. So did you take any action to have those who are—who do handle those—that type of work to review whether his clearance should be revoked in light of his untrustworthiness?

A. That's done by our Policy Compliant Unit. They handle that. I wouldn't get—

Q. Did you—

A. —involved in it. I—

Q. Did you suggest to the Policy—excuse me. Did you communicate with the Policy Compliance Unit that it might be appropriate for them to consider this?

A. I don't recall.

Q. Okay. Did you engage in any restriction of Mr. MacLean's duties during that interim period?

A. No.

Q. Okay. Let's turn then now to whether or not there was any basis for him to be confused about the status of the information as SSI information.

HCD. Mr. Donzanti explained that at that time, he was not able to accomplish administrative actions as quickly as desired, explaining:

> Things don't happen that fast. We had a very small staff back then. We were still a nascent organization. And it wasn't unusual to take that long.

Id. Although the appellant argues that the approximately three month period above undermines Mr. Donzanti's conclusion on the appellant's rehabilitation potential, the timeline as set forth at the hearing does not support such a finding. *See id.* The record reflects that the SSI disclosure occurred on July 29, 2003, and the testimony above reflects that Mr. Donzanti learned that the appellant was responsible for the SSI disclosure approximately two years later, in approximately July 2005, following the ICE OPR interview. *See id.* Moreover, Mr. Donzanti testified that he did not have the authority to suspend and/or revoke the appellant's security clearance, nor did he believe that he, as the SAC at that time, had the unilateral authority to place the appellant on immediate administrative leave in July 2005 under these circumstances, without following a unspecified "procedure" and process. *Id.* Under these circumstances, it is unclear how the three month gap addressed above evinces an improper consideration of the appellant's rehabilitation potential by Mr. Donzanti. *See id.*

In view of the considerations just cited, I find that the deciding official considered relevant factors and exercised his discretion within tolerable limits of reasonableness. *Douglas,* 5 M.S.P.R. at 306.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: _____
Franklin M. Kang
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **June 16, 2010**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2009 MSPB 114

Docket No.: SF-0752-06-0611-I-2

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

June 22, 2009

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶ 1 This case is before the Board on an interlocutory appeal from the February 10, 2009 Order of the administrative judge (AJ) staying the proceedings and certifying for review by the Board his rulings on three issues: (1) Whether the Board has the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that information

the appellant disclosed constituted Sensitive Security Information (SSI); (2) whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him affects the issue in (1) above; and (3) whether a disclosure of information that is SSI can be a disclosure protected by the Whistleblower Protection Act (WPA) under 5 U.S.C. § 2302(b)(8)(A). The AJ ruled in the affirmative with regard to issues (1) and (2) and in the negative with regard to issue (3). For the reasons set forth below, we REVERSE the AJ's rulings as to issues (1) and (2), AFFIRM AS MODIFIED his ruling with regard to issue (3), VACATE the stay order, and RETURN the case to the Western Regional Office for further adjudication.

BACKGROUND

¶ 2 Prior to his removal, the appellant was employed by the agency's Transportation Security Agency (TSA) in the SV-I position of Federal Air Marshal (FAM). Initial Appeal File (IAF) 1 (SF-0752-06-0611-I-1), Tab 1. The relevant facts are undisputed. In July of 2003, the appellant received a text message on his government-issued mobile phone stating that all RON (Remain Overnight) missions up to August 9th would be cancelled. The appellant alleged that he believed that the cancellation of these missions was detrimental to public safety. He raised this concern with his supervisor. He then attempted to raise it with the Office of the Inspector General. On July 29,

2003, he disclosed the text message to the media. IAF 1, Tab 4, Subtab 4(J) (Exhibit 2). The agency conducted an investigation. IAF 1, Tab 4, Subtab 4(J). Thereafter, by letter dated September 13, 2005, the agency proposed to remove the appellant based on three charges: (1) Unauthorized Media Appearance; (2) Unauthorized Release of Information to the Media; and (3) Unauthorized Disclosure of SSI. IAF 1, Tab 4, Subtab 4(G). In the notice of removal, however, the deciding official determined that charges (1) and (2) of the proposal were not sustained by the evidence of record. He sustained charge (3), Unauthorized Disclosure of SSI. IAF 1, Tab 4, Subtab 4(A). In that charge, the agency alleged that on July 29, 2003, the appellant disclosed to the media that all Las Vegas Field Office FAMs were sent a text message to their government-issued mobile phones that all RON missions would be cancelled, or words to that effect, in violation of 49 C.F.R. § 1520.5(b)(8)(ii). IAF 1, Tab 4, Subtabs 4(A), 4(G). Effective April 11, 2006, the agency removed the appellant based upon its decision to sustain charge (3) and its determination that, after consideration of the *Douglas* factors, the penalty of removal was appropriate for the sustained charge. IAF 1, Tab 4, Subtab 4(A).

¶ 3 The appellant filed a timely appeal of the removal to the Board. IAF 1, Tab 1. He alleged, among other things, that the removal was based on whistleblowing because the agency would not

have taken the action in the absence of the protected disclosures. *Id.*

¶ 4 Subsequently, on August 31, 2006, the agency issued a "Final Order," finding that the appellant's disclosure of information to the media, as set forth in the charge, was SSI covered by 49 C.F.R. § 1520.7(j) (2003). IAF 1, Tab 22 (Attachment). The appellant moved to dismiss the appeal without prejudice to allow him to petition for review of the Final Order to the U.S. Court of Appeals for the Ninth Circuit. *Id.*, Tab 27. The agency did not object to the motion. *Id.*, Tab 28. Accordingly, the AJ dismissed the appeal without prejudice to refiling, among other things, no later than 30 days after the Court of Appeals had issued a final determination in the appellant's petition for review of the agency's Final Order on SSI. IAF 1, Tab 29. On September 16, 2008, the Court of Appeals issued a decision denying the appellant's petition. *MacLean v. Department of Homeland Security*, 543 F.3d 1145 (9th Cir. 2008); IAF 2, Tab 1. The court found that the agency's determination that the information the appellant disclosed to the press was SSI was supported by substantial evidence. *Id.*

¶ 5 The appellant timely refiled his appeal with the Board's regional office. IAF 2 (SF-0752-06-0611-I-2), Tab 1. During proceedings on the refiled appeal, the AJ convened a conference call to discuss discovery-related issues. IAF 2, Tab 3. The parties, however, agreed that it would be

more efficient to obtain rulings from the AJ on certain legal issues so they could determine how to proceed. The parties agreed to confer and submit a list of the issues on which they would like rulings. Thereafter, the AJ was to issue an order framing the issues and directing the parties to brief them, after which time he would rule on them. *Id.* The parties, however, could agree on only one issue, i.e., whether the WPA can protect a disclosure that is SSI. IAF 2, Tab 6. Subsequently, the AJ ordered the parties to brief six issues and both parties complied with his request. IAF 2, Tabs 7, 8, 10. The AJ issued an order on December 23, 2008, ruling on the six issues briefed by the parties, including the three issues that are the subject of this interlocutory appeal. IAF 2, Tab 14. As noted above, with regard to issues (1) and (2), he ruled in the affirmative. As to issue (3), he ruled in the negative. *Id.* The agency moved for certification of an interlocutory appeal on issues (1) and (2). IAF 2, Tab 20. The appellant opposed the agency's motion for certification. *Id.*, Tab 21. The AJ granted the agency's motion for certification of an interlocutory appeal on issues (1) and (2). He added issue (3) and certified his rulings on the three issues for review by the Board. IAF 2, Tab 23.

Government Accountability Project (GAP) Submission

¶ 6 Subsequent to the AJ's certification of this interlocutory appeal to the Board, GAP filed a motion for leave to file a brief of *amicus curiae* supporting the appellant in this matter. Along with its motion, GAP submitted a brief addressing issue (3) certified for interlocutory appeal. IAF 2, Tab 25. In its brief, GAP argues that the AJ's ruling that a disclosure of information that is SSI cannot also be a disclosure protected by the WPA under 5 U.S.C. § 2302(b)(8)(A) cannot co-exist with Congressional intent or public policy underlying the WPA. In addition, GAP argues that it cannot co-exist with statutory language because the ruling would restore specific agency authority rejected by Congress, fails to recognize that Congress used different language when referring to statutory versus regulatory authority, would add loopholes to whistleblower protection not included in statutory language, and disregards the critical criteria of specificity even for statutory restrictions on whistleblowing disclosures. In addition, the Federal Law Enforcement Officers Association (FLEOA) filed a motion for leave to join as *amicus curiae* the brief filed by GAP supporting the appellant in this matter. The motions of GAP and FLEOA are GRANTED and the Board has considered these additional legal arguments in deciding the issues in this interlocutory appeal.

ANALYSIS

¶ 7 An AJ may certify an interlocutory appeal if he determines that the issues presented are of such importance to the proceeding that they require the Board's immediate attention. 5 C.F.R. § 1201.91. An AJ will certify a ruling for review only if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion, and an immediate ruling will materially advance the completion of the proceeding, or that the denial of an immediate ruling will cause undue harm to a party or the public. *Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620, ¶ 6 (2008); 5 C.F.R. § 1201.92. With regard to the issues noted above, we find that these requirements have been met.

(1) Whether the Board lacks the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that information the appellant disclosed constituted SSI and (2) whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him affects the issue in (1) above.

¶ 8 Because the analysis of these two issues is intertwined, we consider the issues together. The agency argues that the Board lacks the authority to review the agency's affirmed SSI determination because (1) Congress provided the TSA with the responsibility of defining, regulating, and protecting SSI under 49 U.S.C. § 114(s), and (2)

the only avenue it provided individuals to challenge TSA's SSI determination is before the United States Court of Appeals pursuant to 49 U.S.C. § 46110.

¶ 9 The starting point for every case involving statutory construction is the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985); *Miller v. Department of Transportation*, 86 M.S.P.R. 293, ¶ 7 (2000). Where the statutory language is clear, it must control absent clearly expressed legislative intent to the contrary. *Lewark v. Department of Defense*, 91 M.S.P.R. 252, ¶ 6 (2002); *Todd v. Department of Defense*, 63 M.S.P.R. 4, 7 (1994), *aff'd*, 55 F.3d 1574 (Fed. Cir. 1995). Statutory provisions should not be read in isolation; rather, each section of a statute should be construed in connection with other sections so as to produce a harmonious whole. *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 17 (2007).

¶ 10 The initial statutory provision at issue in this matter provides, in pertinent part, the following:

> **(s) Nondisclosure of Security Activities.—**
>
> **(1) In general**—Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter

> 449 of this title if the Under Secretary decides that disclosing the information would—
>
> **(A)** be an unwarranted invasion of personal privacy;
>
> **(B)** reveal a trade secret or privileged or confidential commercial or financial information; or
>
> **(C)** *be detrimental to the security of transportation*.

49 U.S.C. § 114(s)(1) (emphasis added).

¶ 11 In his December 23, 2008 issues and rulings order, the AJ determined that the Board has the authority to review the determination by the deciding official in the removal action that the information the appellant disclosed was SSI. IAF 2, Tab 14. He found that the timing of the agency's issuance of a Final Order on this matter had an affect on his determination. In addition, he noted that the charge at issue in this appeal was brought on September 13, 2005, was sustained by the deciding official on April 10, 2006, and was an improper disclosure of SSI as defined in 49 C.F.R. § 1520.5(b)(8). He noted further that the agency's Final Order finding that the information the appellant disclosed constituted SSI under the SSI regulation then in effect, 49 C.F.R. § 1520.7(j), was not issued until August 31, 2006. He reasoned that in reviewing the agency's charge, the Board will review the charge the agency brought, not a charge it could have, but did not bring.

He further explained that the nature of an agency's action against an appellant at the time that an appeal is filed with the Board is determinative of the Board's jurisdiction. Applying these two rules, the AJ found that the agency's decision to issue a Final Order finding that the information the appellant disclosed constituted SSI had no effect on its burden to prove each of the elements of its charge by preponderant evidence, including that the information the appellant disclosed met the regulatory definition of SSI. He concluded that if the agency had issued a Final Order finding that the information the appellant disclosed constituted SSI, and then removed him based on that Final Order, the Board would be bound by any court decision on appeal of the order. He stated that, although the Board lacks the authority to review the Final Order issued by the agency on August 31, 2006, pursuant to 49 U.S.C. § 46110, the Final Order is not at issue in this appeal, as it did not, in fact, exist at the time the agency brought its charge. *Id.*

Congress provided TSA with the responsibility of defining, regulating, and protecting SSI.

¶ 12 Congress initially required the federal agency responsible for civil aviation security to issue regulations prohibiting the disclosure of certain information in the interest of protecting air transportation. Federal Aviation Act of 1958, Pub. L. No. 93-366, §§ 202, 316(D), 72 Stat. 7449

(codified at 49 U.S.C. §§ 1341-1355). At that time, the Federal Aviation Administration (FAA) was the agency responsible for enforcing the requirement. *Id.* Later, Congress placed this responsibility in TSA. Aviation and Transportation Security Act of 2001 (ATSA), Pub. L. No. 107-71, § 101(e), 115 Stat. 597. Under this authority, the Under Secretary of TSA is required to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). Based upon this mandate, the Under Secretary has defined certain types of information as SSI and has limited the disclosure of that information to certain circumstances. 49 C.F.R. part 1520.

¶ 13 Sensitive Security Information is defined in the regulations as, among other things, "[s]pecific details of aviation security measures that are applied directly by the TSA and which includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 C.F.R. § 1520.7(j) (2003). Information of this kind, as well as records containing such information, constitutes SSI unless the Under Secretary provides in writing to the contrary. 49 C.F.R. § 1520.7. Based upon the foregoing, we find that Congress provided TSA with

the responsibility of defining, regulating, and protecting SSI under 49 U.S.C. § 114(s).

Congress provided individuals with an avenue to challenge TSA's SSI determination before the United States Court of Appeals pursuant to 49 U.S.C. § 46110, and the appellant in this case availed himself of that avenue, so the finding of the court is binding in this proceeding.

¶ 14 In charge (3), the appellant is alleged to have disclosed SSI when he disclosed to the media that all Las Vegas Field Office FAMs were sent a text message to their government-issued mobile phones that all RON missions would be cancelled, or words to that effect. During proceedings below, the AJ then assigned the case granted the appellant's motion to dismiss the appeal without prejudice to allow the appellant the opportunity to appeal the agency's Final Order finding that the information he disclosed constituted SSI. IAF 1, Tab 7.

¶ 15 Under 49 U.S.C. §§ 114(s), 46110(a), when the Under Secretary determines by final order that particular material qualifies as SSI, that determination constitutes final agency action subject to judicial review. 49 U.S.C. § 46110. The statute authorizes review of such orders in the D.C. Circuit or the court of appeals for the circuit in which a complaining party resides or has its principal place of business. *Id.* Congress provided the D.C. Circuit or U.S. Courts of Appeals with the exclusive jurisdiction to review the agency's SSI determination. *Id.* Under 49 U.S.C.

§ 46110(c), only these courts are authorized to "affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings." A decision by a court of appeals pursuant to this section may be reviewed only by the Supreme Court under section 1254 of title 28. 49 U.S.C. § 46110(e).

¶ 16 In addition, as noted above, the appellant actually appealed the agency's Final Order to the U.S. Court of Appeals for the Ninth Circuit. *MacLean*, 543 F.3d at 1145. In finding that the information contained in the text message qualifies as SSI, the court interpreted the construction it gives to the term "order" in the statute at 49 U.S.C. § 46110. The court stated, in pertinent part, that:

> [P]ursuant to 49 U.S.C. § 46110(c), we have jurisdiction to review only final agency "orders." We give "broad construction to the term 'order' in" § 46110, but the TSA's classification of its own order as a "final order" does not control our review. Generally, an order under § 46110 is reviewable if it "'carries a note of finality, and applies to any agency decision which imposes an obligation, denies a right, or fixes some legal relationship.'" We have explained that an agency decision qualifies as a final "order" under 49 U.S.C. § 46110 if it possesses four qualities: (1) it is supported by a "reviewable administrative record," (2) it is a "'definitive' statement of the agency's posi-

> tion," (3) it has a "'direct and immediate effect' on the day-to-day business on the party asserting wrongdoing," and (4) it "'envisions immediate compliance with the [order's] terms.'"
>
> . . . . We review de novo legal questions raised by the TSA's order. We review the TSA's findings for substantial evidence. *See* 49 U.S.C. § 46110(c). We may set aside the order if it is unconstitutional, contrary to law, arbitrary and capricious, *ultra vires*, or unsupported by substantial evidence, *see* 5 U.S.C. § 706(2)(A)-(E), but we must also accord deference to an agency's interpretation of its own regulations. We may "affirm, amend, modify, or set aside any part of the order and may order the Secretary . . . to conduct further proceedings." 49 U.S.C. § 46110(c).

Id. at 1149-50 (citations omitted). Thus, Congress provided individuals with an avenue to challenge TSA's SSI determination in federal appellate courts pursuant to 49 U.S.C. § 46110. Further, the appellant actually availed himself of that avenue and received an adverse decision. Accordingly, we hold that, under the facts of this case, the Board does not have the authority to review TSA's SSI determination because the U.S. Court of Appeals for the Ninth Circuit has issued a decision upholding TSA's determination.

¶ 17 With regard to the burden of proof issue, the AJ is correct in stating that the agency has the burden to prove each of the elements of its charge by preponderant evidence, including that the in-

> formation the appellant disclosed met the regulatory definition of SSI. 5 U.S.C. § 7701(c)(1)(B). In a Board appeal from an adverse action—
>
> an employee puts the agency in the position of plaintiff bearing the burden of first coming forward with evidence to establish the fact of misconduct, the burden of proof, and the ultimate burden of persuasion, with respect to the basis for the charge or charges. The employee (while denominated appellant) has the advantageous evidentiary position of a defendant with respect to that aspect of the case.

Jackson v. Veterans Administration, 768 F.2d 1325, 1329 (Fed. Cir. 1985).

¶ 18 We find that the agency can meet its burden of proof on the charge because where, as here, a federal court has determined that information relevant to a Board appeal constituted SSI, that determination is binding in the Board proceeding. In an analogous situation involving an employee's entitlement to Office of Workers' Compensation Programs (OWCP) benefits, OWCP's decisions regarding an employee's entitlement to such benefits are final and binding on the Board. *Chamberlain v. Department of the Navy*, 50 M.S.P.R. 626, 634 n.4 (1991); *see also Miller v. U.S. Postal Service*, 26 M.S.P.R. 210, 213 (1985) (where statute makes OWCP's determination regarding entitlement to benefits "final and conclusive for all purposes," such a determination is binding in a Board proceeding).

¶ 19 The fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him does not alter our conclusion on issue (1) above because Congress provided individuals with an opportunity to challenge TSA's SSI determination before the United States Court of Appeals, and the appellant actually availed himself of that opportunity. Pursuant to 49 U.S.C. § 46110(c), the U.S. Court of Appeals for the Ninth Circuit gained "exclusive jurisdiction" over the appellant's petition challenging TSA's SSI determination "when [his] petition [was] sent [to the appropriate TSA official]." Because this grant of "exclusive jurisdiction" in federal court was triggered in this case, the Board lacks authority to review TSA's determination. We need not decide, and do not decide, whether the Board could make its own finding on whether particular information was SSI when the issue was in dispute and material to the outcome in a Board appeal, and there was no federal court decision on the question under 49 U.S.C. § 46110.

(3) Whether a disclosure of information that is SSI can be a disclosure protected by the WPA under 5 U.S.C. § 2302(b)(8)(A).

¶ 20 Title 5 U.S.C. § 2302(b)(8)(A), provides, in pertinent part, the following:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to

> such authority . . . (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, *if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.*

5 U.S.C. § 2302(b)(8)(A) (emphasis added).

¶ 21 The agency argues that a disclosure of information that is SSI, except to "persons with a need to know," is prohibited by statute and regulation, and as such, the appellant cannot seek the protection of the WPA to cover his alleged misconduct. IAF 2, Tab 10. The appellant contends that only agency regulations prohibit disclosure of information that is SSI, and that the Board has interpreted the exclusion from whistleblower protection for disclosures that are "prohibited by law or Executive Order" to apply only to those disclosures not allowed by "statutes and court interpretations of statutes." IAF 2, Tabs 8, 13.

¶ 22 Title 5 U.S.C. § 2302(b)(8)(A) excludes from coverage disclosures "specifically prohibited by law" or Executive order. The agency does not argue that any Executive order prohibited disclosure of the information the appellant allegedly disclosed. The question then is whether any "law" prohibited the alleged disclosure. The Board has held that "prohibited by law," as that term is used in section 2302(b)(8), means prohibited by statutory law as opposed to regulation. *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993). In *Kent,* the Board addressed the question of whether the General Services Administration (GSA) regulations fell within the parameters of the "prohibited by law" language set forth in 5 U.S.C. § 2302(b)(8)(A). The Board ruled that regulations promulgated by a federal agency do not fall within the term "law" as it is used in the Civil Service Reform Act of 1978 (CSRA), as amended by the WPA, after reviewing the construction of the statute and the legislative history.

¶ 23 Here, Congress required in the ATSA that the agency "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). For the reasons set forth below, we find that disclosures that are prohibited by the regulations promulgated pursuant to 49 U.S.C. § 114(s) are

"prohibited by law" within the meaning of 5 U.S.C. § 2302(b)(8)(A).

¶ 24 The starting point for the Board's analysis of the "prohibited by law" language is *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). In *Chrysler*, the Court undertook the analogous task of interpreting a statute that contained a special exception for activities "authorized by law." In considering whether an agency regulation that authorized the activity satisfied the condition, the Court explained:

> It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the force and effect of law. This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause. It would therefore take a clear showing of contrary legislative intent before the phrase "authorized by law" in [the statutory section at issue] could be held to have a narrower ambit than the traditional understanding.

441 U.S. at 295-96.

¶ 25 *Chrysler* thus sets up a default rule, and a specific exception. That is, agency regulations that are (1) properly promulgated, and (2) substantive, must be accorded the force and effect of law absent a clear showing of contrary legislative intent. With regard to the substantive characteristics and procedural requisites, the *Chrysler*

court elaborated three conditions for a rule to have the force and effect of law. These are (1) it must be a "substantive rule"; (2) Congress must have granted the agency authority to create such a regulation; and (3) the regulations must be promulgated in conformity with any procedural requirements imposed by Congress. 441 U.S. at 301-03; *see also Hamlet v. United States*, 63 F.3d 1097, 1105 n.6 (Fed. Cir. 1995) (distilling the three conditions from *Chrysler*).

¶ 26 Here, these three conditions are present for initial application of the default rule to 49 C.F.R. § 1520.7 (2003).[1] A substantive rule is a "legislative-type rule" that "affect[s] individual rights and obligations." *Chrysler*, 441 U.S. at 302. Title 49 C.F.R. § 1520.7 certainly affects individual rights and obligations, by expressly limiting the speech rights of possessors of information defined by the regulation as SSI. It is also clear that 49 U.S.C. § 114(s) expressly granted the Under Secretary the authority to promulgate the regulations, which "prohibit[] the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s). Finally, the regulations at 49 C.F.R. part 1520 were properly

[1] Although not separately discussed, the same analysis applies to the virtually identical language of the current rule codified at 49 C.F.R. § 1520.5.

promulgated under the Administrative Procedure Act rules governing legislative rulemaking—notice was published, comments were received, an interim final rule soliciting further comments was published, and a final rule was issued.

¶ 27 Consequently, "absent a clear showing of contrary legislative intent" the phrase "prohibited by law" in 5 U.S.C. § 2302(b)(8)(A) must be read to include disclosures prohibited by 49 C.F.R. § 1520.7 (2003). In *Kent*, the Board examined the language and legislative history of 5 U.S.C. § 2302(b)(8)(A) and discovered "a clear legislative intent to limit the term 'specifically prohibited by law' . . . to statutes and court interpretations of statutes." 56 M.S.P.R. at 542.

¶ 28 With regard to the statutory language, the Board concluded that inclusion of the phrase "specifically prohibited by law" following other statutory language referring to "a violation of any law, rule, or regulation," "indicated that the term 'law' was not intended to encompass rules and regulations." 56 M.S.P.R. at 542. We do not find that this distinction evidences a clear showing of legislative intent. The differing grammatical structures of the phrases are not compatible. Indeed, drawing a distinction between the phrases "of any law, rule, or regulation" and "by law" based simply on the latter's failure to include "rule, or regulation" begs the question at issue: whether the default construction of "by law" to include regulations has been overcome by

clear legislative intent. Given the traditional default rule, Congress would have no reason to use the broader (and redundant) phrase "by law, rule, or regulation" when "by law" suffices. Moreover, the phrase "by law" has been in legislative use since at least the mid-19th century. *See Chrysler*, 441 U.S. at 296-98 (discussing antecedents to the Trade Secrets Act of 1947, which, since the Revenue Act of 1864, included language prohibiting disclosures except as "provided by law" or "authorized by law"). As the *Chrysler* court explained, the language has been "well-established" to encompass properly promulgated substantive agency regulations. Congress must be presumed to have been aware of these antecedents and their construction when it opted to use the phrase "by law" in the CSRA.

¶ 29 The Board in *Kent* also relied upon legislative history to support its conclusion that disclosures prohibited by regulation are not prohibited "by law" under the CSRA. The Board opined that "Congress' concern with internal agency rules and regulations impeding the disclosure of government wrongdoing is consistent with this restrictive reading of the statutory language." 56 M.S.P.R. at 542 (citing S. Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743). The Board also cited a passage from the House Conference Report explaining that "prohibited by law" refers to "statutory law and court interpretations of those statutes . . . not . . . to agency rules and regulations."

Id. at 542-43 (citing H.R. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864).

¶ 30 A closer examination of the legislative history indicates that Congress' intent is at best ambiguous, and therefore does not meet the standard of clarity required by *Chrysler*. The original version of the bill as introduced in both the House and the Senate protected disclosures that were "not prohibited by law, rule, or regulation." H.R. 11280 and S. 2640. The Senate version was amended by the Senate Committee on Governmental Affairs to substitute the phrase "not prohibited by statute." S. Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2730, 2743. The House version was amended by the House Committee on Post Office and Civil Service to substitute the phrase "not prohibited by law." The full House and Senate each passed their respective versions of the bill, both as S. 2640. In conference, the House language "not prohibited by law" was selected in lieu of the Senate language "not prohibited by statute." H.R. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864. The selection of the broader phrase "by law" evidences Congressional intent to expand the scope of the exemption beyond mere statutes to include all "law." Under the general rules of statutory construction, Congress can be presumed to have known that its selection of the broader phrase "by law,"

in the absence of any limiting language, could expand the scope of the exemption to include all "law." *See D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 232 (1993), *overruled on other grounds, Thomas v. Department of the Treasury*, 77 M.S.P.R. 224 (1998), *Thomas overruled in part on other grounds by Ganski v. Department of the Interior*, 86 M.S.P.R. 32 (2000).

¶ 31 Moreover, the legislative history also shows that even the Senate's adoption of the narrower phrase "by statute" was not intended to exclude substantive regulations mandated by Congress, such as those promulgated pursuant to 49 U.S.C. § 114(s). The Senate Committee on Governmental Affairs modified the original bill to limit the exemption to disclosures prohibited "by statute," out of "concern that the limitation of protection in S. 2640 to those disclosures 'not prohibited by law, rule, or regulation,' would encourage the adoption of *internal procedural regulations against disclosure,* and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing." S. Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743-44 (emphasis added). "Rules of agency organization, procedure, or practice" are recognized as distinct from the "substantive rules" that are authorized by Congress and can have the force of law. *Chrysler*, 441 U.S. at 301. Thus, by expressly excluding "internal proce-

dural regulations," the Senate Committee implicitly included substantive agency regulations.

¶ 32 The House Conference Report explanation that "prohibited by law" refers to "statutory law and court interpretations of those statutes . . . not . . . to agency rules and regulations," could be construed in isolation to suggest an intent to the contrary to protect disclosures prohibited by a substantive regulation. However, in light of the contrary indicia of Congressional intent, this language alone cannot establish the "*clear showing* of contrary legislative intent" required before the phrase "prohibited by law" "could be held to have a narrower ambit than the traditional understanding." 441 U.S. at 295-96. And there is, in fact, no other evidence in the Congressional record to establish that the language was intended to convey such intent. Indeed, the House Report is silent with regard to its substitution of "by law" for the "by law, rule, or regulation" language of the bill as originally introduced. House Report No. 95-1403 at 17 (referring only generally to the specific prohibited personnel practices enumerated at new section 2302(b)(2)-(11)), *reprinted in Legislative History of the Civil Service Reform Act of 1978,* Committee on Post Office and Civil Services, Committee Print No. 96-2 (1979). Furthermore, the minutes of the Conference Committee sessions from which the enacted version of the bill emerged, reflect that the selection of the House's "by law" over the Senate's "by

statute" was not even discussed by the Committee members.

¶ 33 Although the AJ in this case did not undertake a detailed *Chrysler* analysis, his rationale for distinguishing *Kent* was based upon the standards addressed in *Chrysler*. He observed that the statute under which the regulation at issue in *Kent* was promulgated did not "require [the agency] to include in its regulations categories of information that may not be disclosed to a third party, as the GSA alleged Mr. Kent did in a charge underlying its action against him. Therefore, at most, Mr. Kent's disclosure(s) violated the regulations, but not the law that mandated them." Certification Order at 9. The same point made under the *Chrysler* framework would be that one of the three prerequisites to giving the regulation the effect of law was not satisfied because Congress did not grant the GSA authority to promulgate a regulation that prohibited the disclosure of information. In other words, the Board in *Kent* went too far by holding that a regulation could *never* be a law prohibiting disclosure within the meaning of 5 U.S.C. § 2302(b)(8). The same outcome could have been reached by holding simply that the GSA regulation at issue was not entitled to the force and effect of law under the governing standards.[2] In contrast, those standards man-

[2] Thus, to the extent that *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993), holds that a regulation could never be

date that 49 C.F.R. § 1520.7 (2003) be given the force and effect of law in the context of 5 U.S.C. § 2302(b)(8)(A). Based upon the foregoing, we find that a disclosure in violation of the regulations governing SSI, which were promulgated pursuant to 49 U.S.C. § 114(s), is "prohibited by law" within the meaning of 5 U.S.C. § 2302(b)(8)(A) and thus cannot give rise to whistleblower protection.

ORDER

¶ 34 Accordingly, we reverse the AJ's rulings with regard to issues (1) and (2), affirm his ruling as modified with regard to issue (3), and return this appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order. This is the final order of the Merit Systems Protection Board in this interlocutory appeal. 5 C.F.R. § 1201.91.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

a law prohibiting disclosure within the meaning of 5 U.S.C. § 2302(b)(8)(A), we modify it.

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

Docket No. SF-0752-06-0611-I-2

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

Filed: Feb. 10, 2009

ORDER GRANTING MOTION FOR CERTIFICATION AS INTERLOCUTORY APPEAL AND STAYING PROCEEDINGS

Background

On May 10, 2006, the appellant timely filed a petition appealing the decision of the Transportation Security Administration (TSA or "the agency") to remove him from the position of Federal Air Marshal, SV-1, effective April 11, 2006. The Board has jurisdiction over this appeal under 5 U.S.C. §§ 7512(1), 7513(d), 7701(a), and 7702(a).

The agency proposed the appellant's removal on three charges. After the appellant responded to the proposal, the deciding official sustained only the

charge of Unauthorized Disclosure of Sensitive Security Information (SSI). More specifically, the sustained charge alleged that, on July 29, 2003, the appellant disclosed to the media that all Las Vegas Federal Air Marshals were sent a text message to their government-issued mobile phones that all Remain Overnight (RON) missions would be cancelled, or words to that effect, in violation of 49 C.F.R. § 1520.5(b)(8)(ii). The deciding official found that removal remained the appropriate penalty.

After the appellant filed his appeal, on August 31, 2006, the agency issued a "Final Order," signed by Andrew Colsky, Director SSI Office, finding that the appellant's disclosure of information at issue in the charge was SSI, covered by 49 C.F.R. § 1520.7(j).[1] The administrative judge to whom this appeal was assigned at the time denied the appellant's request to either extend the close of discovery or postpone resolution of this appeal while the appellant petition for review of the agency's Final Order to the Court of Appeals, pursuant to 49 U.S.C. § 46110. The administrative judge suggested, however, that he would agree to dismiss the appeal without prejudice to refiling under certain conditions. The appellant moved for such a dismissal, unopposed by the agency, and on October 5, 2006, the administrative judge issued an initial decision dismissing the appeal without prejudice, subject to refiling, *inter alia,* no later than 30 days after the Court of Appeals issues a final de-

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[1] Colsky noted that, on May 18, 2004, TSA had recodified § 1520.70) at 49 C.F.R. 1520.5(b)(8)(ii).

termination in the appellant's petition for review of the agency's Final Order.

On September 16, 2008, the U.S. Court of Appeals for the Ninth Circuit issued a *per curiam* Opinion denying the appellant's petition, finding that the agency's determination that the information the appellant disclosed was SSI was supported by substantial evidence. The appellant timely refiled this appeal and, during an October 20, 2008 conference call, the parties expressed an interest in briefing certain issues the resolution of which they believed could make adjudication of this appeal more efficient. They could not agree on which issues should be the subject of such briefing, however, and submitted separate lists of issues. In a November 14, 2008 Order, I ordered the parties to brief six issues. Both parties complied, and I granted the appellant's request to respond to the agency's brief.

On December 23, 2008, I issued an Order ruling on three of the issues and holding in abeyance a final ruling on two issues, pending further evidence and argument. I found that, as a result of my ruling on one of the issues, it was no longer necessary to decide a remaining issue. The appellant has requested that I reconsider my ruling on one issue, and the agency has moved for certification as an interlocutory appeal of the other two issues on which I ruled. The appellant opposes the agency's motion for certification, and the agency has filed a reply in opposition to the agency's request for reconsideration.

Issues

The three issues on which I ruled are as follows:

(1) Whether the Board has the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that the information the appellant disclosed constituted Sensitive Security Information (SSI).

(2) Whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him has any effect on the issue in (1), above.[2],

(3) Whether a disclosure of information that is SSI can also be a disclosure protected by the Whistleblower Protection Act under 5 U.S.C. § 2302(b)(8)(A),

Discussion and Findings

Issues (1) and (2)

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[2] As to the second issue, I had requested that the parties also address in their briefs "whether the timing of the determination [the agency's Final Order] has any other effect on the issues for adjudication in this appeal." The appellant argued that the agency's issuance of the Final Order after the appeal had been filed evidenced retaliatory animus, but this assertion is not relevant to the issues under consideration in this order, and being certified for interlocutory appeal, and I have therefore edited the second issue to remove the irrelevant portion.

In my December 23, 2008 order, I found that the Board has authority to review the determination by the deciding official in the appellant's removal action that the information the appellant disclosed was SSI. I addressed issues (1) and (2) together because I found that the timing of the agency's issuance of a Final Order on this issue had an effect on my determination. I re-state my analysis below, with some additional explanation.[3]

The only charge at issue in this appeal-Unauthorized Disclosure of SSI-was brought on September 13, 2005, and was sustained by the deciding official on April 10, 2006. In the charge, the agency alleged that the appellant's act of informing the media on July 29, 2003 that all Las Vegas FAMs had received a text message from the agency notifying them that all RON missions up to August 9, 2003 would be cancelled was an improper disclosure of SSI, as SSI is defined in 49 C.F.R. § 1520.5(b)(8). The agency's Final Order finding that the information the appellant disclosed constituted SSI under the SSI regulation then in effect—49 C.F.R § 1520.7(j)—was not issued until August 31, 2006.

It is well-settled that, in reviewing the agency's charge, the Board will review the charge the agency brought, not a charge it could have, but did not, bring.

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[3] Portions of the Discussion and Findings section in this order are similar in many respects to my December 23, 2008 order, with slight changes to clarify some points and to address additional argument by the parties presented after the previous order was issued.

See, e.g., Gustave-Schmidt v. Department of Labor, 87 M.S.P.R. 667, 673 (2001). Moreover, the Board has held that the nature of an agency's action against an appellant at the time that an appeal is filed with the Board is determinative of the Board's jurisdiction. *See Himmel v. Department of Justice,* 6 M.S.P.R. 484, 486 (1991). Applying these precepts to the issue before me, I find that the agency's decision to issue a Final Order finding that the information the appellant disclosed constituted SSI did not have any effect on its burden to prove each of the elements of its charge by preponderant evidence, including that the information he disclosed met the regulatory definition of SSI. While the agency is correct that Congress gave the TSA Administrator authority to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation," 49 U.S.C. § 114(s),[4] I read the statute as providing to the Administrator or his designee authority to set out categories of information that may not be disclosed; the statute does not state that only a TSA official may determine whether a specific disclosure falls within a specific category in the context of an adverse action under appeal before the Board.

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[4] The Board has previously noted that TSA changed the title of Under Secretary to Administrator after the agency was transferred from the Department of Transportation to the Department of Homeland Security. *See Wilke v. Department of Homeland Security,* 104 M.S.P.R. 662, ¶ 5 n.3 (2007).

The agency asserts in its motion to certify this issue as an interlocutory appeal that "the information was SSI at all relevant times: when it was created, when it was transmitted to Appellant and when Appellant improperly disclosed it to the media." The agency has not shown that any individual with authority to make a determination that the appellant had disclosed SSI had done so at the time the appellant was removed, however, and it has never argued that the deciding official had such authority. Under the agency's construction of the statute and its own regulations, any agency employee who serves as a deciding official in an adverse action has the authority to determine that a given disclosure of information falls within the definition of SSI, and that determination cannot be questioned in a proceeding before the Board. I find no support for such a reading of the applicable statute, or even the agency's own regulations and other guidance. To the contrary, if an agency official with proper authority had issued a Final Order finding that the information the appellant disclosed constituted SSI, and then the agency removed him based on the Order, the Board would likely lack the authority to review the conclusion in the Order, and would be bound by any court decision on appeal of the order. Although the Board lacks the authority to review the Final Order issued by Andrew Colsky on August 31, 2006, pursuant to 49 U.S.C. § 46110,[5] the Final Order is not at issue in

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[5] I do not find the agency's cite to *Croft v. Department of the Air Force*, 40 M.S.P.R. 320 (1989) on point. In *Croft*, the Board agreed with the agency that it lacked authority to review the

this appeal, as it did not, in fact, exist at the time the agency brought its charge.

The agency also argues that the doctrine of collateral estoppel applies to the decision of the 9th Circuit Court of Appeals that substantial evidence supports the finding in the Final Order that the information the appellant divulged was SSI.[6] The Board has found that issue preclusion, or collateral estoppel, is appropriate when: (1) The issue is identical to that involved in the prior action; (2) the issue was actually

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agency's determination that certain information was classified, based on the Supreme Court's decision in *Department of the Navy v. Egan,* 484 U.S. 518 (1988). In *Egan,* the Court grounded its decision, in large part, on the primacy of the executive branch, under the Constitution, in assessing what information must be classified in the interest of national security. Here, while it is inarguable that Transportation security is highly important, and that Congress directed the agency to identify categories of information that cannot be disclosed, there is no separation of powers question at issue, and, absent issuance of a Final Order upon which the agency based its action, no precedent for foreclosing Board review of the agency's SSI assessment. In fact, the Board has read *Egan* narrowly, and has been loath to extend it to circumstances that do not involve classified information. And, TSA's Interim Sensitive Security Information (SSI) Policies And Procedures For Safeguarding And Control states that "SSI is not classified national security information subject to the handling requirements governing classified information."

[6] The agency cites the 9th Circuit opinion to support several of its points, particularly that the order would have an impact on the appellant's Board appeal of his termination. The Board may look to opinions of Circuits other than the Federal Circuit for guidance, but the opinions are not binding precedent. *See, e.g., Bullock v. Department of the Air Force,* 88 M.S.P.R. 531, ¶ 14 n.7 (2001).

litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *See McNeill v. Department of Defense,* 100 M.S.P.R. 146, ¶ 15 (2005). As explained below, however, I agree with the appellant that the issue that the Board must adjudicate in this appeal is not "identical" to that decided by the court of appeals.

First, the agency charged the appellant with disclosing information that was SSI under 49 C.F.R. § 1520.5(8)(ii), a version of the regulation promulgated in 2004, while the Final Order found that his action had disclosed information that was SSI as defined in 49 C.F.R. 1520.7(j), which had been in effect in 2003. Although the two regulations are quite similar, the appellant has submitted evidence that Mr. Colsky, the agency's own expert on SSI, considered the differences between the regulations to be significant. Second, the issue before the 9th Circuit was whether substantial evidence supported the agency's contention that the information the appellant had disclosed amounted to SSI while, before the Board, the agency must prove by preponderant evidence that the information he divulged constituted SSI. *See, e.g., Parikh v. Department of Veterans Affairs,* 110 M.S.P.R. 295 (2008) (finding collateral estoppel inapplicable because issues were not identical where issue in first appeal required showing of preponderant evidence and in

second appeal standard was nonfrivolous allegation). Because of these differences in the issue presented, I find that collateral estoppel may not be applied to the court's finding to preclude the appellant from challenging in this appeal whether he divulged information that was SSI.

For the reasons stated above, I conclude that the Board has authority to review the determination in the agency's adverse action that the appellant disclosed information that falls within the regulatory definition of SSI.

Issue (3)

In my December 23, 2008 Order, I found that a disclosure of information that falls within the meaning of SSI is "specifically prohibited by law," pursuant to 5 U.S.C. § 2302(b)(8), and therefore cannot be a "protected" disclosure under the WPA. I have given full consideration to the appellant's request that I reconsider my ruling on this issue, and for the reasons explained below, the agency's request is **DENIED.**

The agency argued that a disclosure of SSI is "prohibited by statute and regulation, and as such, Appellant cannot seek the protection of the Whistleblower Protection Act (WPA) to cover his misconduct." The appellant contended that only agency regulations prohibit disclosure of information that is SSI, and that the Board has interpreted the ineligibility of whistleblower protection for disclosures that are "prohibited by law or Executive Order" to apply only to those disclosures not allowed by "statutes and court inter-

pretations of statutes." Both parties have cited *Kent v. General Services Administration,* 56 M.S.P.R. 536 (1993) in discussing this issue, with the appellant asserting that the holding in the case is directly on point and the agency attempting to distinguish it.

I agree with the parties that *Kent* appears to be the seminal case on the question of whether agency regulations fall within the ambit of the "prohibited by law" language in 5 U.S.C. § 2302(b)(8)(A). And, after careful consideration, I agree with the agency that the facts in the instant case are distinguishable from those in *Kent* in one important respect, and as a result, a disclosure of information that is SSI under the TSA regulations is a disclosure that is "prohibited by law," and is therefore not "protected" under the WPA. First, I agree with the appellant that *Kent* stands for the general proposition that regulations promulgated by a federal agency do not fall within the term "law" as it is used in the Civil Service Reform Act, as amended by the WPA, and that the Board came to that conclusion in *Kent* after reviewing the construction of the statute and the legislative history. In *Kent,* however, the regulations at issue were the Federal Acquisition Regulations (FAR), which are the procurement rules for the federal government that the General Services Administration (GSA) promulgated under a specific delegation of authority by Congress in the Federal Property and Administrative Services Act of 1949. *Kent,* 56 M.S.P.R. at 542. After review of that statute, however, I could find no language requiring GSA to include in its regulations categories of information that may not be disclosed to a third party, as GSA

alleged Mr. Kent did in a charge underlying its action against him. Therefore, at most, Mr. Kent's disclosure(s) violated the regulations, but not the law that mandated them.[7]

In contrast, in the instant case, as noted above, Congress required in the ATSA that the agency "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). Thus, unlike in *Kent,* disclosure of information that is determined to be covered by the SSI regulations also constitutes a disclosure that was explicitly mandated to be prohibited by statute, even if the regulations set the exact parameters, rather than the statute itself. I agree with the agency that it would be an absurd result for Congress to direct TSA to issue regulations prohibiting the disclosure of information that is considered a threat to transportation security, and at the same time to intend that a TSA employee be shielded from discipline by the WPA for violating the regulations by disclosing such information. *See Preyor v. U.S. Postal Service,* 83 M.S.P.R. 571, 580 (1999) (an interpretation of a statute that would lead to absurd

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[7] The fact that the Board found that Mr. Kent's disclosure violated the Trade Secrets Act does not impact the relevant analysis in this order regarding whether regulations can be considered "law" in 5 U.S.C. § 2302(b)(8), as the Board addressed the Trade Secrets Act and the FAR separately in its opinion in *Kent.* 56 M.S.P.R. 536.

results is to be avoided when it can be given a reasonable application consistent with its words and legislative purpose). I find it highly unlikely that Congress would have tasked TSA with prescribing regulations prohibiting the disclosure of SSI if it believed that those regulations lacked the force and effect of "law" for purposes of the WPA, under all circumstances. *See Kligman v. Office of Personnel Management,* 103 M.S.P.R. 614, ¶ 12 (2006) (Congress is assumed to be aware of administrative interpretations of statute). Accordingly, I conclude that the fact that Congress specifically mandated the SSI regulations, unlike in *Kent,* brings the regulations within the definition of "law" in 5 U.S.C. 2302(b)(8)(A), and that a disclosure of information falling within the meaning of the SSI regulations is therefore "specifically prohibited by law," and cannot be a "protected disclosure" under the WPA.[8]

Certification for Interlocutory Appeal

I hereby **GRANT** the agency's motion, over appellant's opposition, and certify my ruling on the first two questions above for interlocutory appeal, pursuant to

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[8] I have afforded specific consideration to the appellant's argument that the use of the word "specifically" in the statute, which I left out in some of my discussion in my prior order, undermines my analysis. I am nonetheless unconvinced that inclusion of the word means that regulations to prohibit disclosure of certain information, promulgated at the direction of Congress, can never be considered "law" for purposes of the WPA.

5 C.F.R. § 1201.91.[9] I find that the issues "involve[] an important question of law or policy about which there is substantial ground for difference of opinion; and . . . [a]n immediate ruling will materially advance the completion of the proceeding," in that a ruling will clarify the agency's burden of proof at hearing on the only charge in this appeal. Further, I certify my ruling on the third question for interlocutory appeal on my own motion, as it also meets the standard set out above. Moreover no precedent on the issue exists and a ruling will determine whether the appellant may raise the defense that the agency's action was taken in retaliation for what he believes to be protected disclosures.

Proceedings Stayed

Pursuant to 5 C.F.R. § 1201.93(c), I hereby stay all further proceedings at the Regional level pending the full Board's resolution of the certified issues.

It is so **ORDERED.**

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[9] The agency slightly altered the issues l set out in my December 23, 2008 order in its motion. The changes to issue (1) are insignificant, but the agency states issue (2) as "Whether the fact that the Agency's final order post-dated Appellant's removal affects the Board's jurisdiction over the Agency's final order." It is undisputed, however, that the Board lacks jurisdiction to review the agency's final order. The question is whether the Board has authority to review the agency's determination that the appellant disclosed SSI as part of the charge because the agency issued the order after it removed the appellant. Accordingly, although I granted the agency's motion to certify the issue for interlocutory appeal, I did not alter the issue to match the question stated in the agency's motion.

FOR THE BOARD: /s/ CRAIG A. BERG
CRAIG A. BERG
Administrative Judge

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

Docket No. SF-0752-06-0611-I-2

ROBERT J. MACLEAN, APPELLANT

v.

DEPARTMENT OF HOMELAND SECURITY, AGENCY

Dec. 23, 2008

ORDER

Following a lengthy dismissal of this appeal, without prejudice, during an October 20, 2008 conference call the parties indicated that adjudication of this appeal would likely be more efficient if they could obtain rulings on certain issues prior to determining how to proceed. After soliciting input to identify the subject issues, in a November 14, 2008 order, I directed the parties to file evidence and argument on six issues arising from the facts and applicable law in this appeal. Both parties complied and, on December 10, 2008, I granted the appellant's request to reply to the agency's brief. The appellant timely filed his reply on December 12, 2008.

Issues and Rulings

(1) Whether the Board has the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that the information the appellant disclosed constituted Sensitive Security Information (SSI).

(2) Whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him has any effect on the issue in (1), above, and whether the timing of the determination has any other effect on the issues for adjudication in this appeal.

After full consideration, I find that the Board has authority to review the determination by the deciding official in the appellant's removal action that the information the appellant disclosed was SSI. I address issues (1) and (2) together because, as explained below, I find that the timing of the agency's issuance of a Final Order on this issue has an effect on my determination.

The only charge at issue[1] in this appeal-Unauthorized Disclosure of SSI was brought on September 13, 2005, and was sustained by the deciding official on April 10, 2006. In the charge, the agency alleged that the appellant's act of informing the media on July 29, 2003 that all Las Vegas FAMs had received a text message from the agency notifying them that all RON missions up to August 9, 2003 would be cancelled was an improper disclosure of SSI, as SSI is defined in

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[1] The other charges in the proposal letter were not sustained by the deciding official.

49 C.F.R. § 1520.5(b)(8). The agency's Final Order finding that the information the appellant disclosed constituted SSI under the SSI regulation then in effect—49 C.F.R § 1520.7(j)-was not issued until August 31, 2006.

It is well-settled that, in reviewing the agency's charge, the Board will review the charge the agency brought, not a charge it could have, but did not, bring. *See, e.g., Gustave-Schmidt v. Department of Labor*, 87 M.S.P.R. 667, 673 (2001). Moreover, the Board has held that the nature of an agency's action against an appellant at the time that an appeal is filed with the Board is determinative of the Board's jurisdiction. *See Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1991). Applying these precepts to the issue before me, I find that the agency's decision to issue a Final Order finding that the information the appellant disclosed constituted SSI did not have any effect on its burden to prove each of the elements of its charge by preponderant evidence, including that the information he disclosed met the regulatory definition of SSI. If the agency had issued a Final Order finding that the information the appellant disclosed constituted SSI, and then removed him based on the Order, the Board would likely lack the authority to review the conclusion in the Order, and would be bound by any court decision on appeal of the order. Although the Board lacks the authority to review the Final Order issued by Andrew Colsky on August 31, 2006, pursuant to 49 U.S.C.

§ 46110,[2] the Final Order is not at issue in this appeal, as it did not, in fact, exist at the time the agency brought its charge.

The agency also argues that the doctrine of collateral estoppel applies to the decision of the 9th Circuit Court of Appeals that substantial evidence supports the finding in the Final Order that the information the appellant divulged was SSI. The Board has found that issue preclusion, or collateral estoppel, is appropriate when: (1) The issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party

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[2] I do not find the agency's cite to *Croft v. Department of the Air Force*, 40 M.S.P.R. 320 (1989) on point. In *Croft*, the Board agreed with the agency that it lacked authority to review the agency's determination that certain information was classified, based on the Supreme Court's decision in *Egan v. Department of the Navy*, 484 U.S. 518 (1988). In *Egan*, the Court grounded its decision, in large part, on the primacy of the executive branch, under the Constitution, in assessing what information must be classified in the interest of national security. Here, while it is inarguable that Transportation security is highly important, and that Congress directed the agency to identify categories of information that cannot be disclosed, there is no separation of powers question at issue, and, absent issuance of a Final Order upon which the agency based its action, no precedent for foreclosing Board review of the agency's SSI assessment. In fact, the Board has read *Egan* narrowly, and has been loath to extend it to circumstances that do not involve classified information.

to the earlier action or as one whose interests were otherwise fully represented in that action. *See McNeill v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005). As explained below, however, I agree with the appellant that the issue that the Board must adjudicate in this appeal is not "identical" to that decided by the court of appeals.

First, the agency charged the appellant with disclosing information that was SSI under 49 C.F.R. § 1520.5(8)(ii), a version of the regulation promulgated in 2004, while the Final Order found that his action had disclosed information that was SSI as defined in 49 C.F.R. 1520.7(j), which had been in effect in 2003. Although the two regulations are quite similar, the appellant has submitted evidence that Mr. Colsky, the agency's own expert on SSI, considered the differences between the regulations to be significant. Second, the issue before the 9th Circuit was whether substantial evidence supported the agency's contention that the information the appellant had disclosed amounted to SSI while, before the Board, the agency must prove by preponderant evidence that the information he divulged constituted SSI. *See, e.g., Parikh v. Department of Veterans Affairs*, 2008 WL 5159249 (Dec. 10, 2008) (finding collateral estoppel inapplicable because issues were not identical where issue in first appeal required showing of preponderant evidence and in second appeal standard was nonfrivolous allegation). Because of these differences in the issue presented, I find that collateral estoppel may not be applied to the court's finding to preclude the appellant from chal-

lenging in this appeal whether he divulged information that was SSI.

I conclude that the Board has authority to review the determination in the agency's adverse action that the appellant disclosed information that falls within the regulatory definition of SSI.

(3) Whether the information the appellant disclosed that is the basis for the agency's third "reason" for his removal falls within the meaning of SSI in 49 C.F.R. § 1520.5(8)(ii).

Following review of the argument and existing record evidence, I find this to be a close question. Based on the argument presented, I find it appropriate to hold a ruling on this issue in abeyance until after the parties have an opportunity to present testimony at hearing.

(4) Whether a disclosure of information that is SSI can also be a disclosure protected by the Whistleblower Protection Act under 5 U.S.C. § 2302(b)(8)(A).

The agency argues that a disclosure of SSI is "prohibited by statute and regulation, and as such, Appellant cannot seek the protection of the Whistleblower Protection Act (WPA) to cover his misconduct." The appellant contends that only agency regulations prohibit disclosure of information that is SSI, and that the Board has interpreted the ineligibility of whistleblower protection for disclosures that are "prohibited by law or Executive Order" to apply only to those disclosures not allowed by "statutes and court interpretations of statutes." Both parties have cited *Kent v. General*

Services Administration, 56 M.S.P.R. 536 (1993) in discussing this issue, with the appellant asserting that the holding in the case is directly on point and the agency attempting to distinguish it.

After researching this issue, I agree with the parties that *Kent* appears to be the seminal case on the question of whether agency regulations fall within the ambit of the "prohibited by law" language in 5 U.S.C. § 2302(b)(8)(A). And, after careful consideration, I agree with the agency that the facts in the instant case are distinguishable from those in *Kent* in one important respect, and as a result, a disclosure of information that is SSI under the TSA regulations is a disclosure that is "prohibited by law," and is therefore not "protected" under the WPA. First, I agree with the appellant that *Kent* stands for the general proposition that regulations promulgated by a federal agency do not fall within the term "law" as it is used in the Civil Service Reform Act, as amended by the WPA, and that the Board came to that conclusion in *Kent* after reviewing the construction of the statute and the legislative history. In *Kent*, however, the regulations at issue were the Federal Acquisition Regulations, which are the procurement rules for the federal government that the General Services Administration (GSA) promulgated under a specific delegation of authority by Congress in the Federal Property and Administrative Services Act of 1949. *Kent*, 56 M.S.P.R. at 542. After review of that statute, however, I could find no language requiring GSA to include in its regulations categories of information that may not be disclosed to a third party, as GSA alleged Mr. Kent did in

a charge underlying its action against him. Therefore, at most, Mr. Kent's disclosure(s) violated the regulations, but not the law that mandated them.[3]

In contrast, in the instant case, as the agency points out, Congress required in the ATSA that the agency "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). Thus, unlike in *Kent*, disclosure of information that is determined to be covered by the SSI regulations also constitutes a disclosure that was explicitly mandated to be prohibited by statute, even if the regulations set the exact parameters, rather than the statute itself. I agree with the agency that it would be an absurd result for Congress to direct TSA to issue regulations prohibiting the disclosure of information that is considered a threat to transportation security, and at the same time to intend that a TSA employee be shielded from discipline by the WPA for violating the regulations by disclosing such information. *See Preyor v. U.S. Postal Service*, 83 M.S.P.R. 571, 580 (1999) (an interpretation of a statute that would lead to absurd results is to be avoided when it can be given a reasonable application consistent with its words and legislative purpose). I find it highly unlikely that Congress would have tasked TSA with

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[3] The fact that the Board found that Mr. Kent's disclosure violated the Trade Secrets Act does not impact the relevant analysis in this order.

prescribing regulations prohibiting the disclosure of SSI if it believed that all regulations lacked the force and effect of "law" for purposes of the WPA, under all circumstances. *See Kligman v. Office of Personnel Management*, 103 M.S.P.R. 614, ¶ 12 (2006) (Congress is assumed to be aware of administrative interpretations of statute). Accordingly, I conclude that the fact that Congress specifically mandated the SSI regulations, unlike in *Kent*, brings the regulations within the definition of "law" in 5 U.S.C. 2302(b)(8)(A), and that a disclosure of information falling within the meaning of the regulations is therefore "prohibited by law," and cannot be a "protected disclosure" under the WPA.

(5) Whether, if the answer to question (4) above is in the affirmative, the appellant's disclosure described in reason 3 of the agency's letter proposing his removal, was "protected" under the WPA.

Not applicable.

(6) Whether the appellant's disclosure in reason 3 of the proposal letter was protected by the First Amendment of the U.S. Constitution, and therefore cannot be the basis for an adverse action.

The parties have cited applicable case law on this issue, which requires the Board to balance the individual and societal interests that are served when employees speak on matters of public concern with the needs of government employers attempting to perform their important public functions. *See Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006); *Chambers v. Department of the Interior*, 103 M.S.P.R. 375 (2006).

Nonetheless, while the parties have made argument on this issue, and I find it likely that I will conclude that the agency had a significant interest in protecting the information at issue in the charge, I find that the record is not sufficiently developed to make a ruling on this issue at this time. Accordingly, I hold in abeyance a ruling on whether the appellant's disclosure was protected by the First Amendment, pending testimony regarding the competing interests at hearing.

It is so **ORDERED**.

FOR THE BOARD: _____

Craig A. Berg
Administrative Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2011-3231

ROBERT J. MACLEAN, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY, RESPONDENT

Filed: Aug. 30, 2013

Petition for review of the Merit Systems Protection Board in No. SF0752060611-I-2

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before: RADER, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, MOORE, O'MALLEY, REYNA, WALLACH, and TARANTO, *Circuit Judges*.*

PER CURIAM.

ORDER

A combined petition for panel rehearing and rehearing en banc was filed by the respondent Department of Homeland Security, and a response thereto was invited by the court and filed by the petitioner. The petition and response were referred to the panel

that heard the appeal, and thereafter were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is denied.

(2) The petition for rehearing en banc is denied.

The mandate of the court will issue on September 6, 2013.

FOR THE COURT

Aug. 30, 2013 — Date

/s/ DANIEL E. O'TOOLE
DANIEL E. O'TOOLE
Clerk

* Circuit Judge Chen did not participate.

cc: Lawrence Berger
Thomas M. Devine
Michael P. Goodman
F. Douglas Hartnett
David B. Nolan

APPENDIX H

1. 5 U.S.C. 2302 provides in pertinent part:

Prohibited personnel practices

* * * * *

(b) Any employee who has authority to take, direct others to take, recommend or approve any personnel action, shall not, with respect to such authority—

* * * * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

If such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

* * * * *

2. 49 U.S.C. 114(r) (Supp. V 2011) provides:

Transportation Security Administration

(r) NONDISCLOSURE OF SECURITY ACTIVITIES.—

(1) IN GENERAL.—Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the security of transportation.

(2) AVAILABILITY OF INFORMATION TO CONGRESS.—Paragraph (1) does not authorize information to be withheld from a committee of Congress authorized to have the information.

(3) LIMITATION ON TRANSFERABILITY OF DUTIES.—Except as otherwise provided by law, the Under Secretary may not transfer a duty or power under this subsection to another department, agency, or instrumentality of the United States.

(4) LIMITATIONS.—Nothing in this subsection, or any other provision of law, shall be construed to authorize the designation of information as sensitive security information (as defined in section 1520.5 of title 49, Code of Federal Regulations)—

(A) to conceal a violation of law, inefficiency, or administrative error;

(B) to prevent embarrassment to a person, organization, or agency;

(C) to restrain competition; or

(D) to prevent or delay the release of information that does not require protection in the interest of transportation security, including basic scientific research information not clearly related to transportation security.

3. 49 U.S.C. 40119(b) (2000 and Supp. V 2005) provides:

Security and research and development activities

(b) DISCLOSURE.—(1) Notwithstanding section 552 of title 5 and the establishment of a Department of Homeland Security, the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to transportation safety.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

4. 49 U.S.C. 40119(b) (2000) provides:

Security and research and development activities

(b) DISCLOSURE.—(1) Notwithstanding section 552 of title 5, the Administrator shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities under section 44501(a) or (c), 44502(a)(1) or (3), (b), or (c), 44504, 44505, 44507, 44508, 44511, 44512, 44513, 44901, 44903(a), (b), (c), or

(e), 44905, 44912, 44935, 44936, or 44938(a) or (b) of this title if the Administrator decides disclosing the information would—

(A) be an unwarranted invasion of personal privacy;

(B) reveal a trade secret or privileged or confidential commercial or financial information; or

(C) be detrimental to the safety of passengers in air transportation.

(2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

5. Pub. L. No. 107-71, § 101(e), 115 Stat. 603 provides:

SEC. 101. TRANSPORTATION SECURITY ADMINISTRATION

(e) SECURITY AND RESEARCH AND DEVELOPMENT ACTIVITIES.— Section 40119 of such title is amended—

(1) in subsection (a) by striking "Administrator of the Federal Aviation Administration" and inserting "Under Secretary of Transportation for Security";

(2) in subsections (b) and (c) by striking "Administrator" each place it appears and inserting "Under Secretary"; and

(3) in subsection (b)(1)(C) by striking "air".

6. 49 C.F.R. 1520 (2002) provides in pertinent part:

* * * * *

§ 1520.5 Records and information protected by others.

(a) *Duty to protect information.* The following persons must restrict disclosure of and access to sensitive security information described in § 1520.7 (a) through (g), (j), (k), and (m) through (r), and, as applicable, § 1520.7 (l) to persons with a need to know and must refer requests by other persons for such information to TSA or the applicable DOT administration:

(1) Each person employed by, contracted to, or acting for a person listed in this paragraph (a).

(2) Each airport operator under part 1542 of this chapter.

(3) Each aircraft operator under part 1544 of this chapter.

(4) Each foreign air carrier under part 1546 of this chapter.

(5) Each indirect air carrier under part 1548 of this chapter.

(6) Each aircraft operator under § 1550.5 of this chapter.

(7) Each person receiving information under § 1520.3 (d).

(8) Each person for which a vulnerability assessment has been authorized, approved, or funded by DOT, irrespective of the mode of transportation.

(b) *Need to know.* For some specific sensitive security information, the Under Secretary may make a finding that only specific persons or classes of persons have a need to know. Otherwise, a person has a need to know sensitive security information in each of the following circumstances:

(1) When the person needs the information to carry out DOT-approved, accepted, or directed security duties.

(2) When the person is in training to carry out DOT-approved, accepted, or directed security duties.

(3) When the information is necessary for the person to supervise or otherwise manage the individuals carrying to carry out DOT-approved, accepted, or directed security duties.

(4) When the person needs the information to advise the persons listed in paragraph (a) of this section regarding any DOT security-related requirements.

(5) When the person needs the information to represent the persons listed in paragraph (a) of this section in connection with any judicial or administrative proceeding regarding those requirements.

(c) *Release of sensitive security information.* When sensitive security information is released to unauthorized persons, any person listed in paragraph (a) of this section or individual with knowledge of the release, must inform DOT.

(d) *Violation.* Violation of this section is grounds for a civil penalty and other enforcement or corrective action by DOT.

(e) *Applicants.* Wherever this part refers to an aircraft operator, airport operator, foreign air carrier, or indirect air carrier, those terms also include applicants for such authority.

(f) *Trainees.* An individual who is in training for a position is considered to be employed by, contracted to, or acting for persons listed in paragraph (a) of this section, regardless of whether that individual is currently receiving a wage or salary or otherwise is being paid.

§ 1520.7 Sensitive security information.

Except as otherwise provided in writing by the Under Secretary as necessary in the interest of safety of persons in transportation, the following information and records containing such information constitute sensitive security information:

(a) Any approved, accepted, or standard security program under the rules listed in § 1520.5(a)(1) through (6), and any security program that relates to United States mail to be transported by air (including that of the United States Postal Service and of the Department of Defense); and any comments, instructions, or implementing guidance pertaining thereto.

(b) Security Directives and Information Circulars under §1542.303 or § 1544.305 of this chapter, and any

comments, instructions, or implementing guidance pertaining thereto.

(c) Any selection criteria used in any security screening process, including for persons, baggage, or cargo under the rules listed in § 1520.5(a)(1) through (6).

(d) Any security contingency plan or information and any comments, instructions, or implementing guidance pertaining thereto under the rules listed in § 1520.5(a)(1) through (6).

(e) Technical specifications of any device used for the detection of any deadly or dangerous weapon, explosive, incendiary, or destructive substance under the rules listed in § 1520.5(a)(1) through (6).

(f) A description of, or technical specifications of, objects used to test screening equipment and equipment parameters under the rules listed in § 1520.5(a)(1) through (6).

(g) Technical specifications of any security communications equipment and procedures under the rules listed in § 1520.5(a)(1) through (6).

(h) As to release of information by TSA: Any information that TSA has determined may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities, to attack. This includes, but is not limited to, details of inspections, investigations, and alleged violations and findings of violations of 14 CFR parts 107, 108, or 109 and 14 CFR 129.25, 129.26, or 129.27 in effect prior to November 14, 2001 (see 14 CFR parts 60 to 139 revised as of

January 1, 2001); or parts 1540, 1542, 1544, 1546, 1548, or § 1550.5 of this chapter, and any information that could lead the disclosure of such details, as follows:

(1) As to events that occurred less than 12 months before the date of the release of the information, the following are not released: the name of an airport where a violation occurred, the regional identifier in the case number, a description of the violation, the regulation allegedly violated, and the identity of the aircraft operator in connection with specific locations or specific security procedures. TSA may release summaries of an aircraft operator's total security violations in a specified time range without identifying specific violations. Summaries may include total enforcement actions, total proposed civil penalty amounts, total assessed civil penalty amounts, number of cases opened, number of cases referred to TSA or FAA counsel for legal enforcement action, and number of cases closed.

(2) As to events that occurred 12 months or more before the date of the release of information, the specific gate or other location on an airport where an event occurred is not released.

(3) The identity of TSA or FAA special agent who conducted the investigation or inspection.

(4) Security information or data developed during TSA or FAA evaluations of the aircraft operators and airports and the implementation of the security programs, including aircraft operator and airport inspections and screening point tests or methods for evalu-

ating such tests under the rules listed in § 1520.5(a)(1) through (6).

(i) As to release of information by TSA: Information concerning threats against transportation.

(j) Specific details of aviation security measures whether applied directly by the TSA or entities subject to the rules listed in § 1520.5(a)(1) through (6). This includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.

(k) Any other information, the disclosure of which TSA has prohibited under the criteria of 49 U.S.C. 40119.

(l) Any draft, proposed, or recommended change to the information and records identified in this section.

(m) The locations at which particular screening methods or equipment are used under the rules listed in § 1520.5(a)(1) through (6) if TSA determines that the information meets the criteria of 49 U.S.C. 40119.

(n) Any screener test used under the rules listed in § 1520.5(a)(1) through (6).

(o) Scores of tests administered under the rules listed in § 1520.5(a)(1) through (6).

(p) Performance data from screening systems, and from testing of screening systems under the rules listed in § 1520.5(a)(1) through (6).

(q) Threat images and descriptions of threat images for threat image projection systems under the rules listed in § 1520.5(a)(1) through (6).

(r) Information in a vulnerability assessment that has been authorized, approved, or funded by DOT, irrespective of mode of transportation.

7. 49 C.F.R. 1520 provides in pertinent part:

* * * * *

§1520.5 Sensitive security information.

(a) *In general.* In accordance with 49 U.S.C. 114(s), SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would—

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

(2) Reveal trade secrets or privileged or confidential information obtained from any person; or

(3) Be detrimental to the security of transportation.

(b) *Information constituting SSI.* Except as otherwise provided in writing by TSA in the interest of public safety or in furtherance of transportation secu-

rity, the following information, and records containing such information, constitute SSI:

(1) *Security programs and contingency plans.* Any security program or security contingency plan issued, established, required, received, or approved by DOT or DHS, including any comments, instructions, or implementing guidance, including—

(i) Any aircraft operator, airport operator, fixed base operator, or air cargo security program, or security contingency plan under this chapter;

(ii) Any vessel, maritime facility, or port area security plan required or directed under Federal law;

(iii) Any national or area security plan prepared under 46 U.S.C. 70103; and

(iv) Any security incident response plan established under 46 U.S.C. 70104.

(2) *Security Directives.* Any Security Directive or order—

(i) Issued by TSA under 49 CFR 1542.303, 1544.305, 1548.19, or other authority;

(ii) Issued by the Coast Guard under the Maritime Transportation Security Act, 33 CFR part 6, or 33 U.S.C. 1221 *et seq.* related to maritime security; or

(iii) Any comments, instructions, and implementing guidance pertaining thereto.

(3) *Information Circulars.* Any notice issued by DHS or DOT regarding a threat to aviation or maritime transportation, including any—

(i) Information circular issued by TSA under 49 CFR 1542.303, 1544.305, 1548.19, or other authority; and

(ii) Navigation or Vessel Inspection Circular issued by the Coast Guard related to maritime security.

(4) *Performance specifications.* Any performance specification and any description of a test object or test procedure, for—

(i) Any device used by the Federal Government or any other person pursuant to any aviation or maritime transportation security requirements of Federal law for the detection of any person, and any weapon, explosive, incendiary, or destructive device, item, or substance; and

(ii) Any communications equipment used by the Federal government or any other person in carrying out or complying with any aviation or maritime transportation security requirements of Federal law.

(5) *Vulnerability assessments.* Any vulnerability assessment directed, created, held, funded, or approved by the DOT, DHS, or that will be provided to DOT or DHS in support of a Federal security program.

(6) *Security inspection or investigative information.* (i) Details of any security inspection or investigation of an alleged violation of aviation, maritime, or rail transportation security requirements of Federal law that could reveal a security vulnerability, including the identity of the Federal special agent or other Federal employee who conducted the inspection or audit.

(ii) In the case of inspections or investigations performed by TSA, this includes the following information as to events that occurred within 12 months of the date of release of the information: the name of the airport where a violation occurred, the airport identifier in the case number, a description of the violation, the regulation allegedly violated, and the identity of any aircraft operator in connection with specific locations or specific security procedures. Such information will be released after the relevant 12-month period, except that TSA will not release the specific gate or other location on an airport where an event occurred, regardless of the amount of time that has passed since its occurrence. During the period within 12 months of the date of release of the information, TSA may release summaries of an aircraft operator's, but not an airport operator's, total security violations in a specified time range without identifying specific violations or locations. Summaries may include total enforcement actions, total proposed civil penalty amounts, number of cases opened, number of cases referred to TSA or FAA counsel for legal enforcement action, and number of cases closed.

(7) *Threat information*. Any information held by the Federal government concerning threats against transportation or transportation systems and sources and methods used to gather or develop threat information, including threats against cyber infrastructure.

(8) *Security measures*. Specific details of aviation, maritime, or rail transportation security measures, both operational and technical, whether applied

directly by the Federal government or another person, including—

(i) Security measures or protocols recommended by the Federal government;

(ii) Information concerning the deployments, numbers, and operations of Coast Guard personnel engaged in maritime security duties and Federal Air Marshals, to the extent it is not classified national security information; and

(iii) Information concerning the deployments and operations of Federal Flight Deck Officers, and numbers of Federal Flight Deck Officers aggregated by aircraft operator.

(iv) Any armed security officer procedures issued by TSA under 49 CFR part 1562.

(9) *Security screening information.* The following information regarding security screening under aviation or maritime transportation security requirements of Federal law:

(i) Any procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other authorized person.

(ii) Information and sources of information used by a passenger or property screening program or system, including an automated screening system.

(iii) Detailed information about the locations at which particular screening methods or equipment are used, only if determined by TSA to be SSI.

(iv) Any security screener test and scores of such tests.

(v) Performance or testing data from security equipment or screening systems.

(vi) Any electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems.

(10) *Security training materials.* Records created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal government or another person to carry out aviation, maritime, or rail transportation security measures required or recommended by DHS or DOT.

(11) *Identifying information of certain transportation security personnel.* (i) Lists of the names or other identifying information that identify persons as—

(A) Having unescorted access to a secure area of an airport, a rail secure area, or a secure or restricted area of a maritime facility, port area, or vessel;

(B) Holding a position as a security screener employed by or under contract with the Federal government pursuant to aviation or maritime transportation security requirements of Federal law, where such lists are aggregated by airport;

(C) Holding a position with the Coast Guard responsible for conducting vulnerability assessments, security boardings, or engaged in operations to enforce maritime security requirements or conduct force protection;

(D) Holding a position as a Federal Air Marshal; or

(ii) The name or other identifying information that identifies a person as a current, former, or applicant for Federal Flight Deck Officer.

(12) *Critical aviation, maritime, or rail infrastructure asset information.* Any list identifying systems or assets, whether physical or virtual, so vital to the aviation, maritime, or rail transportation system (including rail hazardous materials shippers and rail hazardous materials receivers) that the incapacity or destruction of such assets would have a debilitating impact on transportation security, if the list is—

(i) Prepared by DHS or DOT; or

(ii) Prepared by a State or local government agency and submitted by the agency to DHS or DOT.

(13) *Systems security information.* Any information involving the security of operational or administrative data systems operated by the Federal government that have been identified by the DOT or DHS as critical to aviation or maritime transportation safety or security, including automated information security procedures and systems, security inspections, and vulnerability information concerning those systems.

(14) *Confidential business information.* (i) Solicited or unsolicited proposals received by DHS or DOT, and negotiations arising therefrom, to perform work pursuant to a grant, contract, cooperative agreement, or other transaction, but only to the extent that the subject matter of the proposal relates to aviation or maritime transportation security measures;

(ii) Trade secret information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities; and

(iii) Commercial or financial information, including information required or requested by regulation or Security Directive, obtained by DHS or DOT in carrying out aviation or maritime transportation security responsibilities, but only if the source of the information does not customarily disclose it to the public.

(15) *Research and development.* Information obtained or developed in the conduct of research related to aviation, maritime, or rail transportation security activities, where such research is approved, accepted, funded, recommended, or directed by DHS or DOT, including research results.

(16) *Other information.* Any information not otherwise described in this section that TSA determines is SSI under 49 U.S.C. 114(s) or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119. Upon the request of another Federal agency, TSA or the

Secretary of DOT may designate as SSI information not otherwise described in this section.

(c) *Loss of SSI designation.* TSA or the Coast Guard may determine in writing that information or records described in paragraph (b) of this section do not constitute SSI because they no longer meet the criteria set forth in paragraph (a) of this section.

* * * * *

§1520.9 Restrictions on the disclosure of SSI.

(a) *Duty to protect information.* A covered person must—

(1) Take reasonable steps to safeguard SSI in that person's possession or control from unauthorized disclosure. When a person is not in physical possession of SSI, the person must store it a secure container, such as a locked desk or file cabinet or in a locked room.

(2) Disclose, or otherwise provide access to, SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA, the Coast Guard, or the Secretary of DOT.

(3) Refer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.

(4) Mark SSI as specified in §1520.13.

(5) Dispose of SSI as specified in §1520.19.

(b) *Unmarked SSI.* If a covered person receives a record containing SSI that is not marked as specified in §1520.13, the covered person must—

(1) Mark the record as specified in §1520.13; and

(2) Inform the sender of the record that the record must be marked as specified in §1520.13.

(c) *Duty to report unauthorized disclosure.* When a covered person becomes aware that SSI has been released to unauthorized persons, the covered person must promptly inform TSA or the applicable DOT or DHS component or agency.

(d) *Additional Requirements for Critical Infrastructure Information.* In the case of information that is both SSI and has been designated as critical infrastructure information under section 214 of the Homeland Security Act, any covered person who is a Federal employee in possession of such information must comply with the disclosure restrictions and other requirements applicable to such information under section 214 and any implementing regulations.

§1520.11 Persons with a need to know.

(a) *In general.* A person has a need to know SSI in each of the following circumstances:

(1) When the person requires access to specific SSI to carry out transportation security activities approved, accepted, funded, recommended, or directed by DHS or DOT.

(2) When the person is in training to carry out transportation security activities approved, accepted, funded, recommended, or directed by DHS or DOT.

(3) When the information is necessary for the person to supervise or otherwise manage individuals

carrying out transportation security activities approved, accepted, funded, recommended, or directed by the DHS or DOT.

(4) When the person needs the information to provide technical or legal advice to a covered person regarding transportation security requirements of Federal law.

(5) When the person needs the information to represent a covered person in connection with any judicial or administrative proceeding regarding those requirements.

(b) *Federal, State, local, or tribal government employees, contractors, and grantees.* (1) A Federal, State, local, or tribal government employee has a need to know SSI if access to the information is necessary for performance of the employee's official duties, on behalf or in defense of the interests of the Federal, State, local, or tribal government.

(2) A person acting in the performance of a contract with or grant from a Federal, State, local, or tribal government agency has a need to know SSI if access to the information is necessary to performance of the contract or grant.

(c) *Background check.* TSA or Coast Guard may make an individual's access to the SSI contingent upon satisfactory completion of a security background check or other procedures and requirements for safeguarding SSI that are satisfactory to TSA or the Coast Guard.

(d) *Need to know further limited by the DHS or DOT.* For some specific SSI, DHS or DOT may make a finding that only specific persons or classes of persons have a need to know.

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§1520.17 Consequences of unauthorized disclosure of SSI.

Violation of this part is grounds for a civil penalty and other enforcement or corrective action by DHS, and appropriate personnel actions for Federal employees. Corrective action may include issuance of an order requiring retrieval of SSI to remedy unauthorized disclosure or an order to cease future unauthorized disclosure.

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